



TOWN OF KITTERY

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TOWN COUNCIL

WORKSHOP AGENDA

MONDAY, JANUARY 4, 2016

COUNCIL CHAMBERS

6:00 P.M.

- Board of Appeals
- Title 4
- Council Goals

Posted 12/30/15

TOWN COUNCIL REPORT – BOARD OF APPEALS REVIEW

RESPONSIBLE INDIVIDUALS: Board of Appeals (BoA)
SPONSOR: tbd

Date: TBD, 2015

Subject: Ordinance - Appeals

EXECUTIVE SUMMARY:

At issue is the fact that, while virtually any permit/licensing decision made by the Town officials is potentially appealable, there is no formal recourse within the Town, other than for certain zoning issues; nor is there established a common pro forma or protocol/process; and, few measures to assure legal bases of decision by any authority for many local appeal obligations.

It appears in Town Code that there is no recourse for some prospective issue decisions beyond a municipal official level, except to engage a very costly, time consuming, and lengthy delay with a Superior Court filing.

“Municipal boards of appeal may assert jurisdiction only when “the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board and that judicial review of board decisions is not appropriate when a board renders an advisory opinion” *30-A M.R.S. § 2691(4.)*

The Board of Appeals considers it appropriate to propose Town Code revisions to achieve those ends at the local level, insofar as municipal officers may deem it prudent, in order to avoid time-consuming, costly and painful pursuit of fundamental rights in state or Federal court. This Report and ultimate recommendations, if enacted, are intended to achieve that.

FACTS BEARING ON THE EQUATION:

A non-exhaustive table was created to identify Town code and state statutes presently addressing appeal/request issues (*encl 1*). Copies/excerpts of Maine Revised Statutes applicable to District Court, Council, and BoA legal matters, along with relevant excerpts from the Maine Municipal Association Board of Appeals manual and Maine DECD Code Enforcement Officer Legal Issues (BoA & Review Group materials) are available (*atch 1-4, available, not included*).

BACKGROUND:

In the 2010 Town Code recodification, Council acknowledged that Kittery’s Zoning Board of Appeals had more responsibilities than zoning adjustment, going so far as to rename it as the Board of Appeals (BoA); identify appeal/request fees under the heading “Title 14” in Appendix A; and, revise some Town code language to reflect the greater scope.

The Board was asked to provide a recommendation to create a Town Code Title 14 compiling relevant appeal/request language into a single code.

A recent BoA review concluded that Kittery’s appeals processes and related Town Code needs to be revised to:

- 1) Correct the many errors, flaws, and conflicts in Town Code related to permits, licenses, and zoning applications;
- 2) Address a number of statutory Town obligations presently unaddressed;
- 3) Identify and clarify the ambiguities in much current language;

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- 4) Reduce extremely complex decision-making bases to protect constitutional rights of property owners, citizenry, and the Town;
- 5) Detail a legally supportable simplified process with informative instructions and hearing protocol;
- 6) Bring consistency to the appeals process and clarify the bases of law for Board of Appeals proceedings; and
- 7) Afford our citizens a quick, simple, and far less costly possible solution to their issues.

The prime purpose would be to honor the clear American right of all citizens to fair, balanced, and non-discriminatory governmental treatment with due process, at every level; with factual, objective, consistent, coherent, and equitable, application of its rules, regulations, and laws without arbitrary and capricious action, bias, conflicts of interest, abuse of discretion, or illegal communications.

It is crucial as evidenced in law, or case law decisions, that a party interested in application to any government entity be provided with unambiguous and complete instruction as to what is required for favorable approval of any agency's requirements.

Furthermore, it is equally crucial for any party believing they are particularly injured by such agency decision to be accorded a clear protocol to address such as they may consider adverse to their rights and interests.

The BoA considers it appropriate to propose Town Code revision of and establishment to achieve those ends at the local level, insofar as municipal officers may deem it prudent, in order to avoid time-consuming, costly and painful pursuit of fundamental rights in state or Federal court.

The main objectives of the endeavor would be to achieve Appeal/Requests features which are reasonable & prudent; consistent & coherent; sensible & common practice; and, supported by statute and case law.

Note: For information, a relatively straight-forward appeal to Superior Court can take more than 18 months and cost upwards of \$75,000.

CURRENT SITUATION:

The Board of Appeals created a draft proposal Title 14, Appeals (*encls 2, 3*)

- A minor revision to Town Code Appendix A would be needed for these revisions (*encl 4*)
- Excerpts from Town code that would need attention for revision consideration were also compiled (*encls 5, 6, 7*)

The Board seeks Council endorsement of this concept; and, establishment of a municipal official review group from the legislatively established entities.

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After a group review, finally recommended proposed drafts would also be reviewed by:

- Department Heads, Municipal staff
- Town Manager, Town Clerk
- Town Attorney
- Planning Board entire
- Port Authority entire
- Conservation Commission, as it deems appropriate
- Parks Commission, as it deems appropriate
- Open Space Advisory Committee, as it deems appropriate

RECOMMENDATIONS:

1. Council endorse the concept of creating an Appeals Title and a report proposing revisions to Town code, as may be appropriate.
2. Council designate a group comprised of one, or more, Councilors; Planning Board, Port Authority, and Appeals Board members; and other municipal officials as they may choose (e.g. Planner, CEO, Manager).
3. Said group to return to Council with a completed report addressing these issues with a consensus recommendation within three months of Council approval.

7 Enclosures

1. Table 14-1 - Appeals
2. Draft Title 14 - Appeals Index
3. Draft Title 14 - Appeals
4. Draft Town Code Appendix A – Schedule 14
5. Draft Appeals - Title 16 Revisions
6. Draft Appeals - Other Code Revisions
7. Draft Chapter 16.4 – Enforcement & Administration

4 Attachments (BoA & Review Group)

1. District Court MRS
2. Council MRS
3. Board of Appeals MRS
4. MMA BoA-CEO Manual Excerpts

TITLE 14 - APPEALS
APPEALABLE CODE SECTIONS

Title / Chapter / Section	MRS	SUBJECT	Action	LICENSE AUTHORITY / DECISION	Local Appeal to
VARIOUS	30-A §2691	BOARD of APPEALS	APPEAL HEARING	BoA	None
VARIOUS	30-A §3701	MUNICIPAL LICENSING AUTHORITY	LICENSES	COUNCIL	Varies
VARIOUS	4 §152 (6-A)	DISTRICT COURT CIVIL JURISDICTION	LAWSUIT	MUNICIPALITY	Court
VARIOUS	28-A §1054	SPECIAL PERMIT for MUSIC, DANCING or ENTERTAINMENT	LICENSE	COUNCIL	BoA
5.1	28-A §1054	AMUSEMENT DEVICES	LICENSE	COUNCIL	BoA
5.2	28-A §1054	SPECIAL AMUSEMENT PERMITS	PERMIT	COUNCIL	BoA
5.3	30-A §3811	INNKEEPERS, VICTUALERS & LODGING HOUSES	LICENSE	COUNCIL	None
5.3	30-A §3814	REVOCATION or SUSPENSION of LICENSE	LICENSE	COUNCIL	None
5.4	None	GARAGE SALES	PERMIT	POLICE CHIEF	None
5.5	30 MRS §2151	MASSAGE ESTABLISHMENTS	LICENSE	POLICE CHIEF	Council
5.6	30-A §3931	MOBILE FOOD-VENDING UNITS	PERMIT	COUNCIL	None
5.7	30-A §3009	SIDEWALK SALES STREET CLOSURE	PERMIT	COUNCIL	None
5.7	30-A §3009	SIDEWALK SALES SITE PLAN	APPROVAL	TOWN PLANNER / CEO	Town Manager
5.8	30-A §3009	TAXICABS	LICENSE	COUNCIL	None
5.9	28-A §1054	ADULT ENTERTAINMENT ESTABLISHMENTS	LICENSE	COUNCIL	None
7.1.5	30-A §3008	CABLE TELEVISION RATE SETTING PROCEDURES	FRANCHISE	COUNCIL	None
7.3.2.3	30-A §3008	FRANCHISE REVOCATION	REVOCATION	COUNCIL	None
7.3.17.2	30-A §3008	CABLE TELEVISION TOWN ACTS	DECISIONS	COUNCIL	None
NONE	30-A §3010	CABLE TELEVISION CONSUMER RIGHTS	TND	TBD	TBD
8.1.4	None	SOLID WASTE DEPOSIT	PERMIT	TOWN CLERK	None
8.1.5	38 §1301	HAZARDOUS WASTE, SEPTAGE & SOLID WASTE MANAGEMENT	LICENSE	TOWN CLERK	None
11	22 §4301	MUNICIPAL GENERAL ASSISTANCE	ASSISTANCE	GA ADMINISTRATOR	Fair Hearing Authority
11	22 §4322	RIGHT to A FAIR HEARING	HEARING	GA ADMINISTRATOR	Fair Hearing Authority
12.1.1	None	EXCAVATIONS	PERMIT	PW COMMISSIONER	None
12.6.4	12 §6671	SHELLFISH, SCALLOPS, WORMS & MISCELLANEOUS LICENSES	LICENSE	TOWN CLERK	None
13.1.4.3	30-A §3443	SPECIAL SEWER ASSESSMENT	FEE	COUNCIL	BoA
13.1.4.6	30-A §3442	SEWER ASSESSMENT APPEAL	FEE	COUNCIL	BoA
13.2.1	30-A §4354	SEWER IMPACT FEE	FEE	CEO	Town Manager
13.3.3.1	30-A §4354	PUBLIC SAFETY IMPACT FEE	FEE	CEO	None
16.4	30-A §4452	ENFORCEMENT of LAND USE REGULATIONS	ENFORCEMENT	CEO	BoA
16.4.3	30-A §3009	ENFORCEMENT of MUNICIPAL ORDINANCES	VARIOUS	CEO	BoA
16.4.3	30-A §4353	DISABILITY STRUCTURE PERMIT	PERMIT	CEO	BoA
16.4.3.17	38 §435	MANDATORY SHORELAND ZONING	APPROVAL	PLANNING BOARD	None
16.4.3.5		BUSINESS USE CHANGES	APPROVAL	TOWN PLANNER / CEO	BoA
16.4.4.14		NON-STORMWATER DISCHARGE	PROHIBITED	CEO	BoA
16.4.4.2		MINOR MODIFICATIONS to an APPROVED PLAN	APPROVAL	CEO / PLANNER	BoA
16.4.4.2		MAJOR MODIFICATIONS to an APPROVED PLAN	APPROVAL	PLANNING BOARD	None
16.4.4.4		STORMWATER & EROSION CONTROL INSPECTION.	REPORT	CEO	BoA
16.4.4.6		STREET ACCEPTANCE AS TOWN WAY	APPROVAL	PLANNING BOARD / COUNCIL	None
16.4.5.6	4 §152 (6-A)	ENVIRONMENTAL LAW - APPEAL of NOTICE of VIOLATION & ORDER	VIOLATION ORDER	CEO	BoA (District Court)
16.5.2		BUILDING/REGULATED ACTIVITY PERMITS	PERMIT	CEO	BoA
16.5.2.1	25 §2356	MUNICIPAL INSPECTION of BUILDINGS	APPROVAL	CEO	BoA
16.5.2.5	30-A §4103(5)	REGULATION of BUILDINGS, PERMITS	PERMIT	CEO	BoA
16.5.3.2		DRAINAGE & SEWAGE DISPOSAL	PERMIT	CEO	BoA
16.5.3.2	22 §42 (3)	SUBSURFACE SEWAGE DISPOSAL	PERMIT	CEO	BoA
16.5.3.4		FLOOD HAZARD ORDINANCE	PERMIT	CEO	BoA
16.5.3.5	10 §9721	MAINE UNIFORM BUILDING & ENERGY CODE	PERMIT	CEO	BoA
16.5.3.5	32 §1153-A	NFPA 70 - NATIONAL ELECTRICAL CODE*	PERMIT	CEO	BoA
16.5.3.5	32 §3403-B	MAINE STATE PLUMBING CODE	PERMIT	CEO	BoA

TITLE 14 - APPEALS
APPEALABLE CODE SECTIONS

16.5.3.5	32 §2353	NFPA 31 - INSTALLATION OF OIL-BURNING EQUIPMENT	PERMIT	CEO	BoA
16.5.3.5	32 §14804	NFPA 30 - FLAMMABLE & COMBUSTIBLE LIQUIDS CODE	PERMIT	CEO	BoA
16.5.3.5	32 §15104-A	BOILER & PRESSURE VESSEL STANDARDS	PERMIT	CEO	BoA
16.5.3.5	32 §15206	ELEVATOR STANDARDS	PERMIT	CEO	BoA
16.5.3.5	25 §2452 & § 2465	NFPA 1 - FIRE CODE	PERMIT	CEO	BoA
16.5.3.5	25 §2452 & § 2465	NFPA 101 - LIFE SAFETY CODE	PERMIT	CEO	BoA
16.5.3.5	25 §2452 & § 2465	NFPA 54 - FUEL GAS CODE	PERMIT	CEO	BoA
16.5.3.5	25 §2452 & § 2465	NFPA 211 - CHIMNEYS, FIREPLACES, VENTS, & SOLID FUEL-BURNING APPLIANCES	PERMIT	CEO	BoA
16.5.3.5	30-A §4173	ELECTRICAL INSPECTIONS & PERMITS	PERMIT	CEO	BoA
16.5.4		CERTIFICATE of OCCUPANCY	CERTIFICATE	CEO	BoA
16.5.5		TEMPORARY HOUSING	APPROVAL	CEO	BoA
16.5.6	30-A §4358	MOBILE HOME PARKS, SEASONAL TRAILER PARKS, & CAMPGROUNDS	FEE	CEO	BoA
16.5.6	30-A §4358	REGULATION of MANUFACTURED HOUSING	APPROVAL	CEO / PLANING BOARD	None
16.5.8	30-A §4215	PLUMBING PERMITS	PERMIT	CEO	BoA
16.5.8.3	30-A §4353(4),	MALFUNCTIONING DOMESTIC WASTE WATER DISPOSAL UNITS	PERMIT	CEO	BoA
16.6	30-A §4353	ZONING ADJUSTMENT	APPROVAL	BoA	None
16.6.4.2	5 §4553-A	PHYSICAL or MENTAL DISABILITY	APPROVAL	NONE	None
16.6.4.2	30-A §4353(4)	VARIANCE	APPROVAL	BoA	None
16.7.7.2	30-A §4354	DEVELOPMENT EXACTION	EXACTION	PLANNING BOARD	None
16.8.10.11		SIGN PERMIT	PERMIT	PLANNER / CEO	BoA
16.8.14	30-A ch 183, s/c 1	JUNKYARDS & AUTOMOBILE GRAVEYARDS	PERMIT	COUNCIL	None
16.8.14	30-A §3753	JUNKYARD & AUTOMOBILE GRAVEYARD PERMIT	PERMIT	CEO	BoA
16.8.19.3	25 §2452 & § 2465	SPRINKLER SYSTEM PERMIT	PERMIT	FIRE CHIEF	BoA
16.9.3.6	38 MRS §435 - §447	WETLANDS ALTERATION	PERMIT	PLANNER	BoA
16.9.6	38 §413	OVERBOARD DISCHARGE SYSTEMS	PERMIT	BoA	None
16.9.6.1	38 §353-B	ANNUAL WASTE DISCHARGE LICENSE FEES (OVERBOARD DISCHARGE)	FEE	CEO	BoA
16.9.8.1	30-A §4452	FLOODPLAIN MANAGEMENT	PERMIT	CEO	BoA
16.10	30-A §4403	SUBDIVISIONS - MUNICIPAL REVIEW & REGULATION	APPROVAL	PLANNING BOARD	None
16.10	30-A §4452	SUBDIVISIONS	APPROVAL	PLANNING BOARD	None
NONE	30-A §3781	CLOSING OUT SALES LICENSE	LICENSE	NONE	None
NONE	30-A §3961	PAWNBROKERS	LICENSE	NONE	None
NONE	5 §4582-A	UNLAWFUL HOUSING DISCRIMINATION	THESE STATUTES HAVE VARIOUS APPLICATIONS IN TOWN THAT SHOW NO DIRECT CONNECTION TO ANY PROCESS/REQUIREMENT		
NONE	5 §4582-C	STANDARDS for MULTIFAMILY & PUBLIC HOUSING			
NONE	5 §4594	PUBLIC ACCOMMODATIONS			
NONE	13 §1371-A	LIMITATIONS ON CONSTRUCTION & EXCAVATION NEAR BURIAL SITES			
NONE	22 ch 153	LOCAL HEALTH OFFICERS			
NONE	22 ch 263	OFFENSES AGAINST PUBLIC HEALTH			
NONE	22 MRS §454	LOCAL HEALTH OFFICER POWERS & DUTIES			
NONE	22 §2642	PUBLIC WATER SUPPLY, MUNICIPAL REGULATION			
NONE	22 §2647	PROTECTION of PUBLIC WATER SOURCE			
NONE	22 §2648	PROTECTION of INTAKE of PUBLIC WATER SUPPLY			
NONE	29-A §101, §§ 42	MOTOR VEHICLE			
NONE	29-A §521	REGISTRATION; DISABILITY REGISTRATION PLATES			
NONE	35-A §3456	SITING for SMALLER-SCALE WIND ENERGY DEVELOPMENT			
NONE	38 §1665-A, §§3	REMOVAL of MERCURY COMPONENTS WHEN VEHICLE USE ENDS			
NONE	38 §2	RULES for CHANNEL LINES; ENFORCEMENT			
NONE	38 §424-A	SUBSURFACE WASTE WATER DISPOSAL - SHELLFISH AREAS			
NONE	38 §7	HARBORMASTER, RELATION to OTHER LAWS			
NONE	38 ch 1, s/c 1	HARBORMASTER; APPOINTMENT; COMPENSATION			

1 MRS §402 (3) (A)-(O)	Public Records
4 MRS §152 (6-A)	District Court Civil Jurisdiction
5 MRS §11001	Right to Review
5 MRS §4553-A	Physical or Mental Disability
5 MRS §4582-A	Unlawful Housing Discrimination
5 MRS §4582-C	Standards for Multifamily and Public Housing
5 MRS §4594	Public Accommodations
10 MRS §9724	Maine Uniform Building and Energy Code
12 MRS §6671	Shellfish, Scallops, Worms and Miscellaneous Licenses
13 MRS §1371-A	Limitations on Construction and Excavation Near Burial Sites
22 MRS §454	Local Health Officer Powers & Duties
22 MRS §2642	Public Water Supply, Municipal Regulation
22 MRS §2647	Protection of Public Water Source
22 MRS §2648	Protection of Intake of Public Water Supply
22 MRS §42 (3)	Subsurface Sewage Disposal
22 MRS §4301	Municipal General Assistance
22 MRS §4322	Right to A Fair Hearing
22 MRS ch 153	Local Health officers
22 MRS ch 263	Offenses Against Public Health
25 MRS §2356	Municipal Inspection of Buildings
28-A MRS §1054	Special Permit for Music, Dancing Or Entertainment
29-A MRS §101, §§ 42	Motor Vehicle
29-A MRS §521	Registration; Disability Registration Plates
30 MRS §2151	Authority to consolidate
30-A MRS §2691	Board of Appeals
30-A MRS §3001	Ordinance Power
30-A MRS §3008	Cable Television Systems
30-A MRS §3009	Enforcement of Municipal Ordinances
30-A MRS §3010	Cable Television Consumer Rights
30-A MRS §3428	Malfunctioning Domestic Waste Water Disposal Units
30-A MRS §3442	Sewer Assessments
30-A MRS §3443	Sewer Arbitration
30-A MRS §3701	Municipal Licensing Authority
30-A MRS §3753	Junkyard & Automobile Graveyard Permit
30-A MRS §3781	Closing Out Sales License
30-A MRS §3811	Innkeepers, Victualers and Lodging Houses
30-A MRS §3814	Revocation or Suspension of License
30-A MRS §3931	Lunch Wagons
30-A MRS §3961	Pawnbrokers
30-A MRS §4103	Regulation of Buildings
30-A MRS §4173	Electrical Inspections and Permits
30-A MRS §4215	Plumbing Permits
30-A MRS §4353	Zoning Adjustment
30-A MRS §4353(4),	Malfunctioning Domestic Waste Water Disposal Units
30-A MRS §4354	Impact Fees
30-A MRS §4358	Regulation of Manufactured Housing
30-A MRS §4403	Subdivisions - Municipal Review and Regulation

30-A MRS §4452	Land Use Enforcement
30-A MRS ch 183, s/c 1	Junkyards & Automobile Graveyards
35-A MRS §3456	Siting For Smaller-Scale Wind Energy Development
38 MRS ch 1, s/c 1	Harbormaster; Appointment; Compensation
38 MRS §2	Rules For Channel Lines; Enforcement
38 MRS §7	Harbormaster, Relation to Other Laws
38 MRS §353-B	Annual Waste Discharge License Fees
38 MRS §413	Waste Discharge Licenses
38 MRS §424-A	Water Quality Problems - Subsurface Waste Water Disposal - Shellfish Areas
38 MRS §435 - §447	Mandatory Shoreland Zoning
38 MRS §1301	Hazardous Waste, Septage and Solid Waste Management
38 MRS §1665-A, §§3	Removal of Certain Mercury Components When Vehicle Use Ends

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Title 14 APPEALS

Chapter 14.1 GENERAL PROVISIONS

14.1.1 Statement of Policy - Right of Appeal.

Except where a statute provides for direct review, or review of a pro forma judicial decree by the Supreme Judicial Court, or where judicial review is specifically precluded, or the issues therein limited by statute, any person who is aggrieved by final Town agency action is entitled to appeal such action as defined herein. Any person aggrieved by the failure or refusal of a Town agency to act is entitled to appeal thereof as defined herein.

14.1.2 Application of Title.

14.1.2.1 In General.

When appeal of any action, or failure, or refusal to act, by a Town agency, that includes any municipal official, department, board, commission, authority, or officer, is provided by statute or is otherwise available by law, proceedings for such review are governed by this Title, except to the extent inconsistent with the provisions of a statute and except for a review of final agency action or the failure or refusal of an agency to act brought pursuant to 5 MRS §11001 et seq., of the Maine Administrative Procedure Act.

14.1.2.2 Permit or License Non-issuance, Suspension, or Revocation.

The failure of the permit/licensing authority to issue a written notice of its decision, directed to the applicant, within thirty (30) days from the date when the application is filed, constitutes a refusal of the permit or license. Any person who has requested a license or permit and was denied, refused, or whose permit/license was revoked or suspended, may, within thirty (30) days of the denial, refusal, suspension or revocation, appeal the decision.

14.1.2.3 Appeal Does Not Stay.

An appeal, as provided herein, from any suspension hereunder, does not stay such suspension pending such appeal.

14.1.3 Jurisdiction.

14.1.3.1 In General.

The Board has the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any official, Board, agency or other body of this town when an appeal is necessary, proper, or required, as defined in this Title as constrained by Section 14.1.3.2.

14.1.3.2 Authority Constrained.

The Board of Appeals may not assert jurisdiction over any matter unless authority is granted in Maine statutes, or the Town, by charter or ordinance, has specified the precise subject matter that may be appealed to the Board (non-exhaustive listing at Table 14-1), and the agency whose action or non-action may be appealed to the Board.

14.1.3.3 Zoning Adjustment.

The Board shall hear appeals from any action or failure to act of municipal officials responsible for administering and enforcing Title 16 Land Use and Development zoning ordinance, except as noted in the following Section. Proceedings involving alleged violations of land use laws and ordinances, whether administered and enforced primarily at the state or the local level, include but are not limited to, those statutes, ordinances, codes, rules and regulations set forth in 4 MRS §152(6-A).

14.1.3.4 Appeal of Planning Board, Port Authority, or Board of Appeals, Decision.

A. An aggrieved party with legal standing may appeal a final decision of the Board of Appeals, Planning Board, or Port Authority, to the York County Superior Court in accordance with Maine Rules of Civil Procedures Section 80B, within forty-five (45) days from the date the decision was rendered.

B. For other than final plan decisions, an aggrieved party with legal standing may appeal a decision of the Planning Board or Port Authority to the Board of Appeals for appellate review within thirty (30) days from the date the decision was rendered.

14.1.3.5 Right of Review Maine Rules of Civil Procedure, Rule 80B, Review of Governmental Action.

Any party with standing may take an appeal to Superior Court within 45 days of the date of the Board of Appeals vote on the original decision, from any order, relief or denial, in accordance with the MRCP, Rule 80B. This time period may be extended by the court upon motion for good cause shown.

14.1.3.6 Right of Review Maine Rules of Civil Procedure, Rule 80K, Land Use Violations.

Any party with standing may take an appeal to District Court within 45 days of the date of the Board of Appeals vote on the original decision, from any order, relief or denial, related to enforcement of land use laws and ordinances or rules administered and enforced locally, as delineated in Section 14.3.2.G, in accordance with the MRCP, Rule 80K. This time period may be extended by the court upon motion for good cause shown.

Chapter 14.2 DEFINITIONS

14.2.1 Purpose.

Except where specifically defined in this Section, elsewhere in Town Code or applicable statute, all words used in this Title carry their customary and usual dictionary meanings unless otherwise clearly indicated by the context. Words used in the present tense include the future and the plural includes the singular; and, gender-specific words (e.g., she, he, his, hers) include the opposite sex equivalent.

14.2.2 Definitions.

Town Code Title 1, Chapter 1.2, Definitions, establishes the Rules of Construction and Definitions applicable to the Town Code, except where further definition for specific application is defined in this and other Titles.

Abuse of discretion means, as a guide to Board decision-making, where a municipal agency has made a discretionary ruling (such as whether to allow a party claiming a hardship to file a brief after the deadline), that decision will be reviewed for abuse of discretion. It will not be reversed unless the decision is "plain error". Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded, while a plain error that affects substantial rights may be considered even though it was not brought to the BoA's attention. The BoA has discretion as to whether or not to correct plain error. The BoA will not correct it unless it led to a "brazen miscarriage of justice". (See also "Unpreserved Error").

APPEALS NOT ADVISORY

Agency means any municipal official, department, board, commission, authority, or officer responsible for and with the authority in law to make decisions governed by the appeals provisions contained herein.

Aggrieved party, for all application in Town Code except zoning adjustment appeals, means persons who believe their financial, personal, or property rights or interests may have been adversely affected by an act, or failure to act, of a Town officer, official, or agency, administrative decision, order, judgment or statute. Aggrieved parties are entitled to challenge adverse decisions.

Aggrieved party, for zoning adjustment appeals under Chapter 14.6, Zoning Adjustment Appeals/Requests, means an owner of land whose property is directly or indirectly affected by the granting or denial of a permit or variance under Town code; a person whose land abuts land for which a permit or variance has been granted; or any other person or group of persons who may seem to suffer particularized injury as a result of the granting or denial of such permit, or variance.

Appellate v. De Novo Review means when reviewing the decision of the appeals Board, the Maine Law Court reviews the "operative decision" (*ibid*), of the Town.

Appellate Review means the appeal process for which the BoA acts only in an appellate capacity. It does not undertake its own fact-finding but simply determines whether there were sufficient facts to support the decision. The operative decision is that of the Planning Board or Port Authority. The Board may reverse the decision of the Planning Board or Port Authority only upon a finding that the decision was clearly contrary to specific provisions of applicable ordinance; or, unsupported by substantial evidence in the record. Matters for which a decision is reversed are remanded to the operative decision authority.

Arbitrary and capricious means an agency's resolution of a question of fact was made on unreasonable grounds or without any proper consideration of circumstances.

Applicant, in this Title, means a person who applies for an appeal or request, and may be referred to as appellant, requestor, or petitioner.

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- 101 **Basis of Law** means the Board’s legal jurisdiction over the matter in question; authority to render a
102 decision; and, the type hearing conducted (i.e. appellate or de novo).
- 103 **Board**, when used by itself in this Title, means the Board of Appeals.
- 104 **Burden of Proof** means the applicant must present all the evidence which the Board needs to determine
105 whether the proposal will comply with applicable requirements of the ordinance/statute. The evidence
106 must be substantial; credible; and, outweigh conflicting evidence.
- 107 **Conclusions of Law** means the statements linking the specific facts covered in the findings of fact to
108 the performance standards/review criteria in the ordinance or statute which the applicant must meet in
109 order to receive the Board’s approval.
- 110 **Chevron review** means that questions of statutory interpretation decided by an agency in a manner that
111 has the force of law are subject to such review. First, always, is the question whether the legislative
112 enacting body has directly spoken to the precise question at issue. If the intent is clear, that is the end of
113 the matter; for the BoA, as well as the municipal agency, must give effect to the unambiguously
114 expressed intent of the legislation. If, however, the BoA determines the enacting body has not directly
115 addressed the precise question at issue, the BoA does not simply impose its own construction on the
116 statute. Rather, if the statute or ordinance is silent or ambiguous with respect to the specific issue, the
117 question for the BoA is whether the agency’s answer is based on a permissible construction of the statute.
- 118 **Clearly erroneous** means when a municipal agency makes a finding of fact, that finding will not be
119 disturbed unless the BoA is left with a "definite and firm conviction that a mistake has been committed"
120 by that agency.
- 121 **De Novo Review** means the BoA acts if it were considering the question for the first time, affording no
122 deference to the preceding agency decisions.
- 123 **Dimensional standard** means and is limited to ordinance provisions relating to lot area, lot coverage,
124 frontage, and setback requirements.
- 125 **Disability** has the same meaning as a physical or mental disability under Title 5, §4553-A.
- 126 **Essential character** of the locality means, as a guide to Board decision-making, that it generally appears
127 to be for example, if a landowner requests a setback variance to build an addition to bring a home closer
128 than the required road setback, but no closer than all of the neighboring homes, the requested variance
129 would not alter the “character of the locality.” However, it probably would not meet the “uniqueness”
130 criterion or the “reasonable return” criterion. The “essential character” standard applies to both use and
131 dimensional variances.
- 132 **Findings of Fact** means statements by the Board summarizing the basic facts involved in a particular
133 application. A fact determined by an agency would be upheld on appeal unless it is unsupported by
134 substantial evidence. The BoA will not conduct an appellate review on such findings unless those
135 findings are shown to have no reasonable basis.
- 136 **Hardship** means a condition that is difficult to endure; suffering; deprivation; oppression.

Legal standing, or locus standi, means the term for the ability of a party to demonstrate sufficient connection to, and harm from, the law or action challenged to support that party's participation in the case. The party is directly subject to an adverse effect by the statute/ordinance or action in question, and the harm suffered will continue unless the relief is granted in the form of a finding that the law either does not apply to the party or that the law is void or can be nullified. This is called the "something to lose" doctrine, in which the party has standing because they directly will be harmed by the conditions for which they are asking for relief.

Mixed questions of law and fact means circumstances usually subjected to de novo review, unless factual issues predominate, in which event the decision will be subject to "clearly erroneous" review. When made by municipal agencies, decisions concerning mixed questions of law and fact are subjected to "arbitrary and capricious" review.

Noncommercial vehicle means a motor vehicle as defined in Title 29-A §101(42) with a gross weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to Title 29-A, §521 and owned by the person with the permanent disability.

Nonconformity, as defined in Maine law and case law, means the following rules relating to nonconforming uses, structures, and lots are established. These court-made rules must be read in light of the specific language of the nonconforming provisions of Title 16 in order to determine whether they apply for the Town. The legislative intent of Kittery's Land Use and Development ordinance is to embody these concepts.

1. Gradual Elimination: "The spirit of zoning ordinances is to restrict rather than to increase any non-conforming uses and to secure their gradual elimination. Accordingly, provisions of a zoning regulation for the continuation of such uses should be strictly construed and provisions limiting nonconforming uses should be liberally construed."

2. Phased Out Within Legislative Standards: "Nonconforming uses are a thorn in the side of proper zoning and should not be perpetuated any longer than necessary. Nevertheless, the rights of the parties necessitate that this policy be carried out within legislative standards and municipal regulations."

3. Expansion: "Where the original nature and purpose of an existing nonconforming use remain the same, and the nonconforming use is not changed in character, mere increase in the amount or intensity of the nonconforming use within the same area does not constitute an improper expansion or enlargement of a nonconforming use", where the language of the ordinance prohibits the extension or enlargement of a nonconforming use or the change of that use to a dissimilar use.

"Any significant alteration of a nonconforming structure is an extension or expansion. When an ordinance prohibits enlargement of a nonconforming building, a landowner cannot as a matter of right alter the structure, even if the alteration does not increase the nonconformity." Where a portion of a structure is nonconforming as to setback or height expanding another portion of the structure to "line it up" or "square it off" constitutes an expansion which increases the nonconformity, **absent language in the ordinance to the contrary.**

4. Replacement: There is no inherent right on the part of a landowner to replace an existing nonconforming structure with a newer one of the same or larger dimensions. That right hinges on whether the ordinance expressly allows it. This is true even where the original building was destroyed by fire or natural disaster.

5. Discontinuance/Abandonment: Zoning ordinances generally attempt to prohibit a person from reactivating a nonconforming use if it has been "abandoned" or "discontinued" for a certain period of time. Absent language in an ordinance to the contrary the word "abandonment" generally is interpreted by the courts on the basis of whether the intent of the landowner was to give up his or her legal right to continue the existing nonconforming use. The owner's intent is generally judged on the basis of "some overt act, or some failure to act, which carries the implication that (the) owner neither claims nor retains any interest in the subject matter of the abandonment."

Although "discontinuance" or cessation of the use for the period stated in the ordinance does not automatically constitute abandonment, it may be evidence of an intent to abandon if accompanied by other circumstances relating to the use or non-use of the property, such as the removal of advertising signs or allowing the building formerly occupied by the use to become dilapidated. If the ordinance regulates the reactivation of a "discontinued" nonconforming use rather than an "abandonment" of such a use, an analysis of the owner's intent is not necessary. Cessation of the use for the period of time stated in the ordinance is enough.

6. Constitutionality: Nonconforming use provisions are included in zoning ordinances "because of hardship and the doubtful constitutionality of compelling immediate cessation of a nonconforming use".

7. Change of Use: The test to be applied in determining whether a proposed use fits within the scope of an existing nonconforming use or whether it constitutes a change of use is: 1) whether the use reflects the "nature and purpose" of the use prevailing when the zoning ordinance took effect; 2) whether there is created a use different in quality or character, as well as in degree, from the original use; or 3) whether the current use is different in kind in its effect on the neighborhood."

8. Illegality of Use; Effect on "Grandfathered" Status: "As a general rule the illegality of a prior use will result in a denial of protected status for that use under a nonconforming use exception to a zoning plan. But violations of ordinances unrelated to land use planning does not render the type of use unlawful."

9. Split Lots: Absent a provision in a zoning ordinance to the contrary, the requirements of the ordinance for a particular zone apply only to that part of the lot which is located in that zone.

Nonconformity, Increase in, of a structure means any change in a structure or property which causes further deviation from the dimensional standard(s) creating the nonconformity such as, but not limited to, reduction in water body, tributary stream or wetland setback distance, increase in lot coverage, or increase in height of a structure.

Property changes or structure expansions which either meet the dimensional standard or which cause no further increase in the linear extent of nonconformance of an existing structure are not considered to increase nonconformity.

There is no increase in nonconformity with the setback requirement(s) if the expansion extends no further into the required setback area than does any portion of the existing nonconforming structure. See 168

A structure may be expanded laterally provided that the expansion extends no closer to a setback boundary than the closest portion of the existing structure from that boundary. Included in this allowance are expansions which in-fill irregularly shaped structures.

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Nonconformity, “Grandfathered” means a "nonconforming use or structure" which was legally in existence when a particular ordinance provision took effect which does not conform to one or more requirements of the new ordinance. The issuance of a permit under a prior ordinance does not confer "grandfathered" status by itself. The use or structure must have been in actual existence and have been legal when the new ordinance took effect in order to be "grandfathered".

Operative Decision means when the BoA conducts a de novo review, it acts as fact-finder and decision maker. The Courts review the appeal Board’s de novo decisions directly. Therefore, the Board of Appeals’ is the operative decision. Final plan decisions by the Planning Board or Port Authority are operative decisions.

Ordinance Interpretation means the bases upon which understanding and application of the meaning, and legislative intent, are applied to Town ordinances, as follows:

1. Consistency: To determine the purpose of an ordinance provision, each section is to be interpreted to be in harmony with the overall scheme envisioned by the Town when it enacted the ordinance. The assumption is that the municipal officers would not have included a provision that clearly was inconsistent with the rest of the ordinance.

2. General Structure of Ordinance as a Whole: Town ordinances must be construed reasonably with regard to the objects sought to be attained and to the general structure of the ordinance as a whole. All parts of the ordinance must be taken into consideration to determine legislative intent.

3. Ambiguity Construed in Favor of Landowner: The restrictions of the Title 16 zoning ordinance run counter to the common law, which allowed persons to do virtually whatever they wanted with their land. Accordingly, restrictions must be strictly interpreted against the Town. Where the ordinance contains exemptions, they should be liberally construed in the property owner's favor.

4. Natural Meaning of Undefined Terms: Town ordinances must be given a strict interpretation and cannot be extended by implication. However, they are to be read according to the natural and most obvious meaning of the language used when there is no express legislative intent to the contrary and where the ordinance does not define the words in question.

5. Nonconforming ("Grandfathered") Uses, Structures, and Lots: Provisions dealing with nonconforming lots, structures and uses are included in the Title 16 zoning ordinance in order to avoid constitutional problems. Such provisions commonly are called "grandfather clauses." (See “Nonconformity, “Grandfathered”).

Person means an individual, corporation, governmental agency, municipality, trust, estate, partnership, association, two or more individuals having a joint or common interest, firm or, in the case of a corporation or association, any official thereof, or other legal entity, as defined in Town Code Title 1, Section 1.2.2.2, Definitions (may also be known as a “party”).

Practical difficulty means that the strict application of the ordinance to the property precludes the ability of the owner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the owner.

Rational Basis Standard of Review means the enacting legislation is judged based on whether it has a reasonable relationship to a legitimate state interest.

Reasonable return means, as a guide for Board decision-making, absent proof that the person has tried to sell that property “as is” and no one will buy it unless the proposed construction can occur, or that the property cannot be used for any other legal purpose under the zoning ordinance without a variance. It does not equal “maximum return.” It is extremely difficult for applicants to prove a reasonable return cannot be realized and that no other permitted use could be conducted legally to realize such a return.

A landowner cannot be forced to sell his land to an abutter as a way to realize a “reasonable return.” However, where an applicant for a variance owns adjoining land which could be used to avoid the need for a variance, a variance should not be granted. The typical request for a setback variance to allow a deck, porch, garage, storage building or addition to an existing structure will have to be denied on the basis of the “reasonable return” standard. In some cases a “reasonable return” can be realized by recreational uses and lake access.

Rule 80B. Review of Governmental Action, means the Maine Rule of Civil Procedures (MRCP) implementing the Maine Administrative Procedure Act for review by the Superior Court. Whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review are governed by these Rules.

Rule 80K. Land Use Violations, means the Maine Rule of Civil Procedures (MRCP) implementing the Maine Administrative Procedure Act for review apply to proceedings in the District Court involving alleged violations of land use laws and ordinances, whether administered and enforced primarily at the state or the local level, including but not limited to, those statutes, ordinances, codes, rules and regulations set forth in 4 MRS §152(6), District Court; civil jurisdiction.

Skidmore review means questions of statutory interpretation decided by a municipal agency in a manner that does not have the force of law are subject to review to determine the deference to be given to a municipal agency's decision based on a four-part test:

- (1) the thoroughness of the agency's investigation;
- (2) the validity of its reasoning;
- (3) the consistency of its interpretation over time; and
- (4) other persuasive powers of the agency.

Standing means an applicant for a permit, license, or other agency code-based approval, being submitted, must be a person who has some “right, title or interest” in the property (see also “Legal standing”).

Substantial evidence means “more than a mere scintilla”. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The preponderance of evidence standard is met if the proposition is more likely to be true than not true. The standard is satisfied if there is greater than fifty percent chance that the proposition is true.

Undue Hardship means:

- a. The land in question cannot yield a reasonable return unless a variance is granted;
- b. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
- c. The granting of a variance will not alter the essential character of the locality; AND
- d. The hardship is not the result of action taken by the applicant or a prior owner.

Unpreserved Error means mistakes made by an agency were not objected to as the law requires.

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Unique circumstances means, as a guide for Board decision-making, the hardship conditions which lead to the granting of variances must be "peculiar and unique" to the land in question. The property and general conditions in the neighborhood, it exists as the only one or as the sole example; single; solitary in type and distinctive in nature or character from others.

A landowner seeking a variance from a required lot size in a case where other lots in the neighborhood are all of a similar substandard size generally cannot meet the "uniqueness" test. The same is true where all the lots in the neighborhood are subject to deed restrictions limiting the size of the structure which can be built on the lot. Likewise, if all of the lots in the area are swampy or steeply sloped, or if they all have rock outcropping, or if they all have utility easements running through them, an application for a variance related to any of these problems would have to be denied. The fact that the lot has no structure while neighboring lots do have structures does not make the subject lot "unique."

Variance means:

1. a relaxation of the terms of this Code where such relaxation will not be contrary to the public interest and where, owing to conditions peculiar to the property and not the result of the actions of the applicant or prior owner, a literal enforcement of the title will result in unnecessary or undue hardship.
2. As used in this title, a variance is authorized only for dimensional requirements related to height, area and size of structure, or size of yards and open spaces. Establishment or expansion of a use otherwise prohibited is not allowed by variance, nor may a variance be granted because of the presence of nonconforming uses in the particular zone or adjoining zone.

Chapter 14.3 BOARD of APPEALS

14.3.1 Board of Appeals Appointment and Composition.

A. The Board of Appeals is established by the Town Charter, Article VIII, Section 8.04, and 30-A MRS §2691.

B. The Board consists of seven (7) members, who are Kittery residents serving staggered terms of office of three years.

C. Members of the Board are appointed by the Town Council.

D. A municipal officer, or spouse thereof, may not serve as a member of the Board.

E. Members serve until their successors are appointed and qualified.

F. The number of consecutive terms by any Board member is limited by Section 8.04 of the Town Charter.

G. A member of the Board may be dismissed for cause by the Town Council before the expiration of such member's term after notice and hearing. SEE TC 207(1)

H. Vacancies are filled by Town Council appointment for the unexpired term.

14.3.2 Board of Appeals Powers and Duties.

A. To elect annually a chairman and vice chairman from its membership and a secretary. It is the duty of the secretary to keep and maintain a permanent record of all meetings of the Board, and show the vote of each member upon each question.

B. A quorum consists of four or more members.

C. A minimum of four (4) like votes is required for a decision by the Board of Appeals, except on procedural matters.

D. Adopt bylaws to govern routine Board proceedings and set agendas and hold meetings to perform duties.

E. Any question of whether a particular issue involves bias or a conflict of interest sufficient to disqualify a member from voting thereon is decided by a majority vote of the members present, except the member who is being challenged, who may not vote on the issue.

F. All records of the Board are public records, except as excluded under 1 MRS §402 (3) (A)-(O), the Maine Freedom of Access (Right to Know) statute.

G. The Board is to:

1. Perform duties as provided by law.

2. Interpret the provisions of an ordinance called into question in deciding any appeal/request. The Board has no authority to attempt resolution of constitutional problems with an ordinance in deciding an application. The Board does not have the power to issue a permit.

3. Provide an advisory opinion on an agency's formal request for a ruling about the intent or proper interpretation of an ordinance as to whether the agency's interpretation is correct. Judicial review of Board decisions is not appropriate when it renders an advisory opinion.

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- 355 4. Hear and decide administrative appeals, on a de novo basis, where it is alleged by an aggrieved
356 party that there is an error in any order, requirement, decision, or determination made by, or failure to
357 act by a Town officer, official, or agency, in review of an action, or non-action, on an application for
358 permit, license, fee, or assessment, as contained in the Town Code.
- 359 5. Hear and decide any administrative appeal in accordance with 28-A MRS §1054, Special Permit
360 for Music, Dancing or Entertainment, and the procedures defined herein.
- 361 6. Hear and decide, on an appellate basis, where it is alleged by an aggrieved party that there is an
362 error in any order, requirement, decision, or determination made by, or failure to act, by the Planning
363 Board or Port Authority, excepting final plan decisions of those agencies.
- 364 7. Hear and decide administrative appeals, on a de novo basis, where it is alleged by an aggrieved
365 party that there is an error in any order, requirement, decision or determination made by, or failure to
366 act by, the Code Enforcement Officer or Town Planner in review of and action on a land use
367 application.
- 368 8. Hear and decide administrative appeals from determinations of the Code Enforcement Officer in
369 the administration of the provisions of Title 16, Chapter 16.9, Article VIII, Floodplain Management.
- 370 9. Hear and decide miscellaneous variation requests to permit variation as defined in Title 16, Land
371 Use and Development and Section 14.6.3.1, Miscellaneous Variation Request.
- 372 10. Hear and decide on a special exception use request as defined in Title 16, Land Use and
373 Development and Section 14.6.3.2.2, using the procedures, review criteria, and other provisions, in
374 Section 14.6.6, Bases for Special Exception Decisions.
- 375 11. Hear and decide on a variance request within the limitations set forth in Section 14.6.3.3,
376 Variance Request, and 30-A MRS §4353(4), including Disability Variance; Vehicle Storage; Setback
377 Variance for Single-Family Dwellings; Variance from Dimensional Standards; and, Floodplain
378 Management Appeals and Variances, as defined in this Title.
- 379 12. Hear and decide any appeal submitted in accordance with Title 16, Section 16.4.5.4, Notice of
380 Violation and Order, and 30-A MRS §4452, Enforcement of Land Use laws and ordinances, as they
381 may be amended from time to time, and the procedures defined herein, for the following
382 requirements:
- 383 a. The plumbing and subsurface waste water disposal rules adopted by the Department of Health
384 and Human Services under 22 MRS §42;
- 385 b. Laws pertaining to public water supplies pursuant to 22 MRS §2642, §2647, and §2648;
- 386 c. Local ordinances adopted pursuant to 22 MRS §2642;
- 387 d. Laws administered by local health officers pursuant to 22 MRS chapters 153 and 263;
- 388 e. Laws pertaining to fire prevention and protection, which require enforcement by local officers
389 pursuant to 25 MRS chapter 313;
- 390 f. Laws pertaining to the construction of public buildings for the physically disabled pursuant to
391 5 MRS §4582-B, §4582-C, and §4594-F;
- 392 g. Local land use ordinances adopted pursuant to 30-A MRS §3001;

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- 393 h. Laws pertaining to junkyards, automobile graveyards and automobile recycling businesses and
394 local ordinances regarding junkyards, automobile graveyards and automobile recycling
395 businesses, pursuant to 30-A MRS chapter 183, subchapter 1; and, 38 MRS §1665-A, §§3;
- 396 i. Local ordinances regarding electrical installations pursuant to 30-A MRS chapter 185,
397 subchapter 2;
- 398 j. Local ordinances regarding regulation and inspection of plumbing pursuant to 30-A MRS
399 chapter 185, subchapter 3;
- 400 k. Local ordinances regarding malfunctioning subsurface waste water disposal systems pursuant
401 to 30-A MRS §3428, and laws regarding malfunctioning subsurface waste water disposal systems
402 pursuant to 38 MRS §424-A;
- 403 l. The subdivision law and local subdivision ordinances adopted pursuant to 30-A MRS §3001
404 and subdivision regulations adopted pursuant to 30-A MRS §4403;
- 405 m. Local zoning ordinances adopted pursuant to 30-A MRS §3001 and in accordance with
406 §4352;
- 407 n. Wastewater discharge licenses issued pursuant to 38 MRS §353-B;
- 408 o. Shoreland zoning ordinances adopted pursuant to 38 MRS §435 to 447, including those that
409 were state-imposed;
- 410 p. Local ordinances and ordinance provisions regarding storm water, including, but not limited
411 to, ordinances provisions regulating non-storm water discharges, construction site runoff and
412 post-construction storm water management, enacted as required by the Federal Clean Water Act
413 and Federal regulations and by state permits and rules;
- 414 q. Laws pertaining to limitations on construction and excavation near burial sites and established
415 cemeteries in 13 MRS §1371-A; and, local ordinances and regulations adopted by municipalities
416 in accordance with this subsection and 30-A MRS §3001 regarding those limitations;
- 417 r. Standards under a wind energy development certification issued by the Department of
418 Environmental Protection pursuant to 35-A MRS §3456, if the municipality chooses to enforce
419 those standards.
- 420 s. The laws pertaining to harbors in 38 MRS chapter 1, subchapter 1; local harbor ordinances
421 adopted in accordance with 38 MRS §7; and, regulations adopted by municipal officers pursuant
422 to 38 MRS §2;

Chapter 14.4 APPEALS/REQUESTS

14.4.1 Purpose.

This chapter describes the minimum requirements for aggrieved parties to file any administrative appeal or petition a request under this title, related titles, and State statutes. Additional requirements for zoning adjustment appeals are found in Chapter 14.6, Zoning Adjustment Appeals/Requests.

14.4.2 Timing / Withdrawal / Continuance.

A. All appeals must be submitted within thirty (30) days of the date of the official, written decision being appealed. Other requests may be filed at will.

B. Applicants may withdraw a filed appeal/request without prejudice or cost any time before public notice is made.

C. Applicants may request continuance for applications for which public notice has been made, without prejudice or additional cost, by making such request at the scheduled hearing; or, by written request in advance of the hearing, specifying the reason for the request.

14.4.3.1 Appeal/Request Filing Procedures.

A. Zoning adjustment administrative appeals or requests must be filed with the Code Enforcement Officer as shown in Section 14.6, Zoning Adjustment Appeals/Requests. All other administrative appeals must be filed with the Town Clerk.

B. All appeals/requests are to be filed on forms approved by the BoA and the applicant must specifically state on such forms the grounds for the appeal or request, including claimed discrepancies in the interpretation of the Town Code, and reasons why the appeal or request should be granted.

C. Incomplete applications for appeals or requests will not be accepted. Upon receipt of an appeal or request application, it must be stamped with a receipt date on the appeal or required form. Said date constitutes the filing date of the appeal or request.

D. Applications for appeals or requests must include the following:

1. Appeals must be made by an aggrieved party or duly authorized agent. Requests may be filed by a person of standing.

2. The appeal or request must include a concise written statement indicating what relief is requested and why the appeal or request should be granted. A minimum of ten (10) sets of all submissions is required.

3. Where the appeal or request is made from a decision by the Code Enforcement Officer, Town Planner, Planning Board, or Port Authority, the applicant must submit plans, maps and related documentation to the Code Enforcement Office for distribution to the BoA members at least two weeks prior to the meeting of the Board of Appeals.

4. The BoA must hold a public hearing on an appeal or request within thirty (30) days of its receipt of a complete written application, unless this time period is extended by mutual agreement of the applicant and BoA.

E. At any time between the initial acceptance by the Code Enforcement Officer of a zoning adjustment appeal/request and final approval or denial of the appeal/request by the BoA, the owner or applicant must allow members of the BoA full access to the subject property, not including building interiors, without obtaining prior permission, written or oral.

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14.4.3.2 Fees.

The applicant must pay a fee for filing an appeal or request in an amount as set by the Town Council in Appendix A to the Town Code.

14.4.4 Hearing and Notice.

A. Before taking any action on any appeal/request, the BoA must schedule a public hearing and provide the following notifications:

1. By mail at least seven (7) and not more than fourteen (14) days prior to the scheduled hearing date, to owners of abutting property that an appeal/ request is made, of the nature of the appeal/ request and of the time and place of the public hearing thereon.; and

2. Notice of all such actions must also be published in a newspaper of general circulation in the Town at least seven days prior to the public hearing.

B. For the purposes of this Notice, the abutting owners of property are considered to be the parties listed by the Town Tax Assessor as those against whom taxes are assessed.

C. Failure of any party to receive a notice of public hearing will not necessitate another hearing or invalidate any action by the Board of Appeals.

14.4.5 Notification and Timing Constraints.

A. The appeal or request must be complete for hearing at a subsequent meeting of the BoA occurring no less than ten (10) days after the mailing of notices but within thirty (30) days of the appeal filing date.

B. Following the filing of a zoning adjustment appeal/request the Code Enforcement Officer must notify the Planning Board and Conservation Commission of the filing.

C. The BoA must decide the appeal or request within thirty (30) days after the close of the hearing, and issue a written notice of decision.

D. When circumstances are such that a plan with an approved appeal or special exception is required to be reviewed by another agency (e.g., DEP, Planning Board, Port Authority), any period the plan is at such agency, from time of submission to time of decision inclusive, verified by recorded documentation, will not be counted as part of a cumulative time period required in this Title.

14.4.6 Order of Review.

A. Where a special exception request or an appeal is necessary as an integral part of a development review process, Board of Appeals action is encouraged prior to any required Planning Board or Port Authority review. The findings of the Board of Appeals as well as any file material must be made available to the Planning Board or Port Authority.

B. The Planning Board or Port Authority may give approval to the preliminary plan as an overall development prior to the applicant filing an appeal/request.

14.4.7 Venue and Representation.

Meetings are conducted according to the duly established Board of Appeals By-laws. At any hearing, any party may appear by agent or attorney.

14.4.8 Code Enforcement Officer Attendance.

The CEO, or designated assistant, must attend all zoning adjustment appeal hearings and must present to the BoA all plans, photographs, or other material the CEO deems appropriate for an understanding of the appeal/request.

14.4.9 Municipal Representation.

Cognizant municipal officer(s) or official(s) responsible for the administrative decision must attend all appeal hearings on the decision or non-action appealed and must present to the BoA all plans, photographs, or other material possessed which the Board deems appropriate for an understanding of the appeal.

14.4.10 Applicant's Case First.

The applicant's case must be heard first. To maintain orderly procedure, each side may proceed without interruption. Questions may be asked through the chairman. All persons at the hearing shall abide by the order of the chairman.

14.4.11 Conduct of Review.

14.4.11.1 Burden of Proof.

The person filing the appeal or request has the burden of proof.

14.4.11.2 De Novo Review.

Except where a Town ordinance provides otherwise, when a decision is appealed, the BoA is not limited to the record prepared by municipal agency in making its decision. The BoA shall hold its own hearing, accept any relevant evidence or testimony presented, and create its own record.

A. The BoA will weigh that evidence along with any other that it receives. The Board does not use its record to judge the validity of the decision made by the municipal agency. The Board must consider that the agency's decision was never made. The Board is not deciding whether the agency's decision was in conformance with the ordinance, whether it was supported by the evidence in the record, or whether it had procedural problems.

B. The Board decides only whether the new record which it has created supports a finding by the Board that the application should be approved or denied. It does this by following the procedures and using the performance standards/review criteria that governed the agency in making the original decision.

C. This means that the BoA is the original decision-maker and starts the review process from scratch, holding its own hearings, creating its own record, and making its own independent judgment of whether a project should be approved based on the evidence in the record which the Board created. The record created by the municipal agency is relevant only to the extent that it is offered as evidence for the record of the BoA hearing.

D. The BoA then must use its record to decide whether the decision in question is "clearly contrary to the ordinance" and "unsupported by substantial evidence in the record."

14.4.11.3 Appellate Review.

The authority of the BoA in deciding such appeal is limited to reversing or approving the decision being appealed. If the Board's record could support a decision either way, then it shall uphold the decision of the municipal agency.

14.4.12 Enforcement Decision Appeals.

When an appeal involves an enforcement decision by a CEO rather than an administrative decision regarding a permit application, the BoA must study the statute/ordinance carefully to determine whether it has jurisdiction.

14.4.13 Reconsideration.

In accordance with 30-A MRS §2691(3)(F), the Board of Appeals may reconsider any decision within forty-five (45) days of its prior decision.

A. A request for the BoA to reconsider a decision must be filed with the Town Clerk or Code Enforcement Officer within ten (10) days of the decision that is to be reconsidered. A vote to reconsider and the action taken on that reconsideration must occur and be completed within forty-five (45) days of the date of the vote on the original decision.

B. Board of Appeals reconsideration of Administrative Decision Appeal decisions are to be a de novo (as if for the first time) proceeding. The Board may receive new evidence and testimony consistent with this Code and the rules of the BoA. The Board may conduct additional hearings and receive additional evidence and testimony.

C. At the conclusion of the hearing(s) and deliberation, the Board may uphold, modify, or reverse its original decision. Reconsideration of a decision requires a positive vote of the entire Board, and proper notification to the landowner, applicant, abutters and those who testified at the original hearing(s).

D. Appeal of a reconsidered decision to Superior Court must be made within fifteen (15) days after the decision on reconsideration.

14.4.14 Second Appeals/Requests.

If the Board of Appeals denies an appeal/request, a second appeal/request of a similar nature may not be brought before the BoA within one year from the date of original denial; unless the applicant submits new evidence and the BoA, by formal action, decides the evidence is significant and warrants a new hearing; or, unless the Board finds in its sole and exclusive judgment that an error or mistake of law or misunderstanding of facts has been made.

14.4.15 Expiration of Approval.

A. Approvals granted under the provisions of this title expire if work or change in use involved is not commenced within six months of the date on which approval is granted, or if the work or change in use is not substantially completed within one year of the date on which such approval is granted, unless as otherwise provided for in the approval decision.

C. Should a successful applicant not be able to commence and/or substantially complete the work or change in use before the time constraints contained above, the applicant may reappear before the Board before the original approval expires and request an extension of the approval.

D. Such a request must be submitted in writing to the Town Clerk or Code Enforcement Officer, as applicable, prior to the date of said approval expiration.

CHAPTER 14.5 BASES FOR BOARD DECISIONS

14.5.1 Basis in Law / Prerequisites.

A. In hearing appeals/requests, the Board must first establish that it has jurisdiction from a basis in law to conduct the hearing and decide the question. The Board must establish the type of review to be conducted (i.e. de novo or appellate) and determine its rational basis standard of review. In cases where the Board's decision is to be appellate or advisory in nature, it is to so state and specify the agency for which the appellate review or advisory opinion is rendered.

B. The Board must then determine whether the applicant has legal standing; basic application form(s) and material(s) are complete and were filed timely; appropriate fee(s) paid; and, that there are no outstanding code violations related to premises in question.

C. If the Board determines the applicant has not met the preliminary requirements of subsection A and B above, the Board must deny the application, expressly stating the reason(s).

D. If the Board decides the applicant has met the preliminary requirements of subsection A and B above, then it may proceed with substantive review.

14.5.1.1 Checklist for Reviewing Evidence.

Before the Board decides whether to hear, approve, or deny, the application, it must establish the following:

1) What does the ordinance/statute require the applicant to prove?

2) Does the ordinance/statute prohibit or limit the type of use being proposed?

3) What factors must the Board consider under the ordinance/statute in deciding whether to approve the application?

4) Has the applicant met the burden of proof, i.e., has the applicant presented all the evidence which the Board needs to determine whether the project will comply with every applicable requirement of the ordinance/statute? Is that evidence substantial? Is it credible? Is it outweighed by conflicting evidence?

5) To what extent does the ordinance/statute authorize the Board to impose conditions on its approval?

14.5.1.2 Board's Decision Basis (De Novo Appeal/Request).

A. As a general rule, once the Board has determined the scope of its authority and the applicant's burden of proof, it must determine whether there is sufficient evidence in the record to support a decision to approve the application by comparing the information in the record to the requirements of the ordinance/statute.

B. The Board must not base its decision on the amount of public opposition or support displayed for the project. Nor must its decision be based on the members' general opinion that the project would be "good" or "bad" for the community. Its decision must be based solely on whether the applicant has met the burden of proof and complied with the provisions of the statute/ordinance.

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C. If the Board does not believe that the applicant's project meets each of the requirements of the ordinance/statute based on the evidence in the record the Board must deny the application. Where a proposed project complies with all of the relevant ordinance requirements, the Board must approve the application.

D. Board members must not abdicate their responsibility, ignore ordinance(s), and approve an application regardless of whether it meets the conditions of the ordinance, or not. Board members who are philosophically hostile to zoning should address their concerns to the local and State legislative bodies that adopt zoning regulations and not allow their personal policy preferences to dictate how they make legal decisions under the ordinance(s).

14.5.2 Standards of Consideration.

14.5.2.1 Substantial Evidence Test.

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The fact that two inconsistent conclusions can be drawn from the recorded evidence related to a specific performance standard does not mean that the Board's conclusion regarding that standard is not supported by "substantial evidence."

Unless the applicant can demonstrate both that the Board's findings are unsupported by record evidence and that the record compels contrary findings, the Board is to deny an application on the basis that shows that the proposed project would have specific adverse consequences in violation of the criteria for approval.

14.5.2.2 Overlap with State and Federal Law.

The Board is required to determine whether any State or Federal laws apply to an applicant's project before the Board may grant its approval.

The Board can draw on the expertise of the applicable State or Federal agency to help it make this determination. Approval of a State or Federal permit does not eliminate the need for the landowner to obtain local approval for a project, if required.

Where a question exists about whether a project complies with State or Federal law, one option for the Board is to adopt a condition of approval requiring the applicant to obtain either approval from the State or Federal agency or a letter from the agency stating that it has no jurisdiction before commencing work under the local permit/approval. The Board's condition should require that proof of the State/Federal approval or letter be filed with the municipality.

14.5.2.3 Expert vs. Non-Expert Testimony; Personal Knowledge.

The Board may base its decision on non-expert testimony in the record if it finds that testimony more credible than expert testimony presented on the same issue. In the absence of expert testimony, the Board may rely on the testimony in the record of anyone personally familiar with the site and conditions surrounding the application. Board members may rely on their own expertise and experience and that of Town professional staff provided that information is formally entered into the record.

14.5.2.4 Investigation by Board Members .

If members of the Board do conduct independent investigations in order to generate information needed to help the Board analyze an application and reach a decision, those members must be careful to be objective in their quest; otherwise, the applicant may have grounds to cite one or more members for bias or due process violations. Such member must use the pro forma guide approved by the Board.

14.5.2.5 Testimony by Witnesses Who Are Not Physically Present at the Meeting.

Testimony is prohibited unless it is offered in person at the meeting or in writing and signed by the witness. Exception to this rule is permitted where all parties have agreed for the record to permit testimony by some other method (e.g., speaker phone, webcam, etc.).

14.5.2.6 Staff Interpretations; Role of the Code Enforcement Officer.

Where a municipal official whose principal job is to interpret an ordinance offers statements about the proper interpretation of the ordinance and whether the applicant's evidence was sufficient to comply with the ordinance, the opinion of that official is entitled to some deference.

The code enforcement officer is not a member of the Board and has no official role regarding the Board's proceedings or the custody and care of Board records. When the code enforcement officer has valuable information and insights to share with the Board that information is to be offered for the Board's official record either in written form or through public testimony offered during a public Board meeting. This helps ensure that no illegal ex parte communications occur.

14.5.2.7 Participation by Board Members Who Miss Meetings.

If a Board member has not been able to attend every meeting at which the Board conducted a public hearing or received and discussed substantive evidence regarding a particular application, such Board member may not participate in making the decision on the application, unless the member demonstrates to the Board that the member is familiar with the evidence sufficient to assure the Board that all statutory criteria have been satisfied by:

- 1) reading hearing and meeting minutes, reviewing any documents or other evidence submitted at those meetings, and listening to/watching any audio or video recordings of those meetings;
- 2) prepare a written statement describing what the Board member did to become educated about what occurred at the missed meeting(s);
- 3) sign the statement in notarized form; and
- 4) enter it into the record at the next meeting.

If the applicant and other parties to the proceeding agree that this is adequate, then this must be noted in the record.

14.5.2.8 Reopening the Hearing Process.

The Board may reopen its hearing process to allow an applicant to submit new evidence to clarify a technical issue and modify its plan without allowing additional public comment. The Board should consider whether there had been prior hearings that were more than adequate to afford due process.

14.5.2.9 Conflict between Ordinances.

Where a Town zoning ordinance prohibits a particular expansion of a nonconforming use but a separate ordinance permits it, the Board must apply the section which governs conflicts between ordinances and rule that the expansion is prohibited, except the rules of nonconformity hold sway over other ordinance provisions for legally existing nonconformance situations. If the Board finds that a conflict exists when there will be a different result from the application of two separate ordinances it must hold that the more restrictive one controls.

14.5.3 Decision Criteria.

The Board must use the following criteria as the bases of its decision:

- A. For zoning adjustment appeals/requests, the criteria shown in Chapter 14.6, Zoning Adjustment Appeals/Requests, Section 14.6.5, Bases for Zoning Appeal/Request Decisions; and where applicable, Section 14.6.6, Bases for Special Exception Decisions, must be met.

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B. For granting or reinstating a license or permit it must find that the:

- 1) permitted activities would not constitute a detriment to the public health, safety, morals, or welfare, or
- 2) refusal, denial, revocation or suspension was not arbitrary or capricious, or
- 3) refusal, denial, revocation or suspension was not based by a preponderance of the evidence on a violation of any ordinance, article, bylaw or regulation of the Town.

C. All appeal decisions must be based on the requirements of the applicable ordinance from which the appeal originated and any applicable State or Federal statute source law.

14.5.4 Preserving Objections for Appeal.

If a party to the proceedings has any objections to procedures or proposed findings by the Board, the party should raise them at the meeting so that the Board has a chance to consider them and address them in its decision. Failure to raise objections before the Board will prevent that person or any other party from making those objections in an appeal to the Superior Court.

14.5.5 Unpreserved Error.

In a case where mistakes made by an agency were not objected to as the law requires the BoA may choose to look at the mistake even though there was no objection, if it determines that the error was evident, obvious, and clear, and materially prejudiced a substantial right, meaning that it was likely that the mistake affected the outcome of the case in a significant way. If a party commits forfeiture of error, e.g., by failing to raise a timely objection, then on appeal, the burden of proof is on that party to show that plain error occurred. If the party did raise a timely objection that was overruled, then on appeal, the burden of proof is on the other party to show that the error was harmless error.

14.5.6 Findings of Fact.

The summary of facts for all appeal/request decisions must include:

- the name of the applicant;
- basic description of the issue;
- key elements of the issue and applicable ordinance(s)/statute(s);
- evidence submitted by the applicant beyond what is shown on a plan;
- evidence submitted by people other than the applicant either for or against the issue; and
- evidence which the Board enters into the record based on the personal knowledge of its members or experts which the Board has retained on its own behalf.

14.5.7 Conclusions of Law.

Such conclusions must include statements linking the specific facts covered in the findings of fact to the performance standards/review criteria in the ordinance(s) or statute(s) which the applicant must meet in order to receive the Board's approval.

14.5.8 Notice of Decisions of the Board of Appeals.

Written notice of the Board's decision must be sent to the applicant, the Code Enforcement Officer, municipal department heads, and Town Council within seven (7) days of the decision. The Conservation Commission, Planning Board, and the Port Authority where appropriate, are to be included for zoning adjustment appeals. The vote of each member must be part of the record. The written notice of the decision of the BoA must include the Board's Findings of Fact and Conclusions of Law. In the case of denials, the statement of findings must include the reason for the denial.

CHAPTER 14.6 ZONING ADJUSTMENT APPEALS

14.6.1 Purpose.

This chapter describes the minimum requirements for aggrieved parties to file an appellate or administrative appeal under this Title and Title 16, Land Use and Development and related State statutes; seek the granting of a special exception as allowed by Town Code Title 16, Chapter 16.3, Land Use and Development; or a variance or miscellaneous variation request to the standards as provided therein and herein.

14.6.1.1 Outstanding Violations.

No administrative decision appeal, variance, special exception, or miscellaneous variation request may be granted for premises on which outstanding violations of this Code exist, unless the effect of such decision, variance, special exception, or miscellaneous variation would remedy all such violations.

14.6.1.2 Prior Mistakes.

The fact that a CEO, or a predecessor, made any mistake in the issuance of a permit does not have any legally binding precedent-setting value. Past mistakes do not give any municipal agency the right to act illegally. However, once the appeal period has expired an applicant may rely on the building permit even if improperly issued.

14.6.1.3 CEO Advisory Opinions.

In a situation where the CEO has a question about the intent or proper interpretation of an ordinance, the CEO may deny the permit and advise the applicant to request a ruling by the Board of Appeals; or, make a formal request for a ruling from the Board. The Board's decision serves only as an advisory opinion as to whether the CEO's interpretation is correct.

14.6.2 Making a Zoning Adjustment Appeal/Request.

Zoning appellate, administrative decision appeals, variance requests, or miscellaneous variation requests are to be submitted to the Board of Appeals in accordance with the procedures in Chapter 14.4, Appeals/Requests.

14.6.3 Zoning Adjustment Appeals/Requests to Board of Appeals.

For the purposes of this Chapter an appeal or request means those powers described in Section 14.3.2.G, above, as further defined in this Section.

14.6.3.1 Miscellaneous Variation Request.

As delineated in Title 16, the Board of Appeals may hear, decide, and approve variations:

- A. To increase allowable lot coverage in the Mixed Use -Badgers Island (MU-BI) zone to seventy (70) percent (Section 16.7.3.2.17);
- B. In Nonconformity (Article III of Chapter 16.7);
- C. To accommodate lots with insufficient frontage (Section 16.7.3.5.9);
- D. To provide for reduced setbacks for lots or buildings made nonconforming (Section 16.7.3.5.9);
- E. To Parking, Loading and Traffic Standards (Article IX of Chapter 16.8);
- F. To Sign Violation and Appeal Standards (Section 16.8.10.3);
- G. For development proposals that do not meet the dimensional standards otherwise required, in order to promote cluster development; (Section 16.8.11.3?);
- H. To allow Intra-Family Dwelling Units (Article XXI of Chapter 16.8);

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I. To approve Major Home Occupations (Article XXII of Chapter 16.8);

J. To Accessory Dwelling Units Standards (Article XXV of Chapter 16.8);

K. To approve Overboard Discharge Systems (Title 16, Section 16.9.6.3).

14.6.3.2.1 Special Exception Use Request.

The Board of Appeals may hear, decide and may grant an applicant's Special Exception Use request where authorized in Title 16, Chapter 16.3, Land Use Zone Regulations, if the proposed use meets the criteria set forth in Section 14.6.6, Bases for Special Exception Decisions.

14.6.3.2.2 Special Exception Referral.

A. Before granting any special exception, the BoA may refer the application to the Planning Board and/or Port Authority, for a report prior to any subsequent Board review of the application.

B. The Planning Board and/or Port Authority report must be considered informational in character, and may take into consideration the effect of the proposal upon the character of the neighborhood or any other pertinent data.

C. The Planning Board and/or Port Authority report must be submitted to the BoA for its consideration prior to the officially scheduled time of public hearing on the request.

14.6.3.3 Variance Request.

A. A variance may only be granted, and only by the Board of Appeals, for disability; setbacks for single family dwellings; dimensional standards; or, floodplain management standards, as contained in Title 16 and where the use is not prohibited by Title 16.

B. A copy of each variance request within the Shoreland Overlay Zone, including the application and all supporting information supplied by the applicant, must be forwarded by the Code Enforcement Officer to the Commissioner of the Maine Department of Environmental Protection at least twenty (20) days prior to action by the BoA. Any comments received from the Commissioner prior to the action by the BoA will be made part of the record to be taken into consideration by the Board.

C. The BoA must limit any variance granted as strictly as possible to ensure conformance with the purposes and provisions of Town Code to the greatest extent possible, and in doing so may impose such conditions of approval to a variance as it deems necessary. The party receiving the variance must comply with any conditions imposed.

14.6.3.3.1 Disability Variance; Vehicle Storage.

A disability variance may be granted pursuant to this subsection. "Disability" has the same meaning as a physical or mental disability under 5 MRS §4553-A.

A. The Board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The Board shall restrict any variance granted under this paragraph solely to the installation of equipment or the construction of structures necessary for access to, or egress from, the dwelling by the person with the disability.

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B. The Board may impose conditions on the variance granted, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. The term "structures necessary for access to or egress from the dwelling" includes railing, wall or roof systems necessary for the safety or effectiveness of the structure.

C. The Board may grant a variance to an owner of a dwelling who resides in the dwelling and who is a person with a permanent disability for the construction of a place of storage and parking for a noncommercial vehicle owned by that person and no other purpose, as follows:

1. The width and length of the structure may not be larger than 2 times the width and length of the noncommercial vehicle. The owner shall submit proposed plans for the structure with the request for the variance.

2. The person with the permanent disability shall prove by a preponderance of the evidence that the person's disability is permanent.

3. "Noncommercial vehicle" means a motor vehicle as defined in 29-A, MRS §101, §§42 with a gross vehicle weight of no more than 6,000 pounds, bearing a disability registration plate issued pursuant to 29-A, MRS §521 and owned by the person with the permanent disability.

14.6.3.3.2 Setback Variance for Single-Family Dwellings.

A. The Board may grant a setback variance for a single-family dwelling only when strict application of the standards found in Title 16 to the petitioner and the petitioner's property would cause undue hardship. The term "undue hardship" as used in this subsection means that the:

1. Need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;

2. Hardship is not the result of action taken by the applicant or a prior owner;

3. Granting of a variance will not alter the essential character of the locality;

4. Granting of a variance will not substantially reduce or impair the use of abutting property; and

5. Granting of a variance is based upon demonstrated need, not convenience, and no other feasible alternative is available.

B. The Board's approval of such variance is strictly limited to permitting a variance from a setback requirement for a single-family dwelling that is the primary year-round residence of the petitioner. Such variance may not exceed 20% of a setback requirement, except as provide in subsection C following, and may not be granted if the variance would cause the area of the dwelling to exceed the maximum permissible lot coverage.

C. The Board's approval of such variance may allow for a variance to exceed 20% of a setback requirement if the petitioner has obtained the written consent of an affected abutting landowner, except for minimum setbacks from a wetland or water body required within shoreland zones by rules adopted pursuant to 38 MRS chapter 3, subchapter I, article 2-B.

14.6.3.3.3 Practical Difficulty Variance from Dimensional Standards.

The Board may grant a variance from the dimensional standards of Title 16 when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty and when the following conditions exist:

1. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;
2. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;
3. The practical difficulty is not the result of action taken by the petitioner or a prior owner;
4. No other feasible alternative to a variance is available to the petitioner;
5. The granting of a variance will not unreasonably adversely affect the natural environment; and
6. The property is not located in whole or in part within shoreland areas as described in 38 MRS §435.

14.6.3.3.4 Floodplain Management Appeals and Variances.

The BoA may, upon written application of an aggrieved party, hear and decide appeals from determinations of the Code Enforcement Officer in the administration of the provisions of Title 16, Chapter 16.9, Article VIII, Floodplain Management. The Board may grant a variance from those requirements consistent with state law and the following criteria:

A. Variances may not be granted within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result.

B. Variances may be granted only upon:

1. A showing of good and sufficient cause; and
2. A determination that should a flood comparable to the base flood occur, the granting of a variance will not result in increased flood heights, additional threats to public safety, public expense, or create nuisances, cause fraud or victimization of the public or conflict with existing local laws or ordinances; and
3. A showing that the existence of the variance will not cause a conflict with other state, Federal or local laws or ordinances; and
4. A determination that failure to grant the variance would result in "undue hardship," which means that the:
 - a. Land in question cannot yield a reasonable return unless a variance is granted, and
 - b. Need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood, and
 - c. Granting of a variance will not alter the essential character of the locality, and
 - d. Hardship is not the result of action taken by the applicant or a prior owner.

C. Variances may only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.

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D. Variances may be issued for new construction, substantial improvements, or other development for the conduct of a functionally dependent use provided that:

1. Other criteria of this Section and Title 16, Section 16.9.8, Floodplain Management, are met; and
2. The structure or other development is protected by methods that minimize flood damages during the base flood and create no additional threats to public safety.

E. Variances may be issued for the reconstruction, rehabilitation or restoration of structures listed on the National Register of Historic Places or a State Inventory of Historic Places, without regard to the procedures set forth in subsections A through D of this Section.

F. Any applicant who meets the criteria of subsections A through E of this Section and receives favorable consideration by the Board is to be notified by the Board in writing that:

1. The issuance of a variance to construct a structure below the base flood level will result in greatly increased premium rates for flood insurance up to amounts as high as twenty-five dollars (\$25.00) per one hundred dollars (\$100.00) of insurance coverage;
2. Such construction below the base flood level increases risks to life and property; and
3. The applicant agree in writing of full awareness of all the risks inherent in the use of land subject to flooding; assumes those risks and agrees to indemnify and hold harmless the municipality against any claims filed against it that are related to the applicant's decision to use land located in a floodplain; and, that applicants must jointly and severally release the municipality from any claims the applicant may have against the municipality that are related to the use of land located in a floodplain.

G. The BoA must submit to the Planning Board a report of all variance actions under this Section, including justification for the granting of the variance and an authorization for the Code Enforcement Officer to issue a flood hazard development permit, which includes any conditions to be attached to said permit.

14.6.3.3.5 Undue Hardship Variance.

The Board may grant a variance from the dimensional standards of Title 16 when strict application of the ordinance to the petitioner and the petitioner's property would cause an undue hardship and when the following conditions exist:

1. The land in question cannot yield a "reasonable return" unless a variance is granted;
2. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood;
3. The granting of a variance will not alter the essential character of the locality;
4. The hardship is not the result of action taken by the applicant or a prior owner;
5. The granting of a variance will not unreasonably adversely affect the natural environment; and
6. The property is not located in whole or in part within shoreland areas as described in 38 MRS §435.

14.6.4 Appellate Review Appeal of Planning Board or Port Authority Operative Decision.

A. Appellate review appeal requests may be filed on operative decisions, other than a final plan decision, of the Planning Board or Port Authority. Materials submitted to the Board of Appeals for appellate review are restricted to those used by the decision-making agency for their review and rendering their decision, including Findings of Fact (the record).

B. The BoA review and decision is constrained to a determination whether there were sufficient facts to support the agency's decision. The Board may reverse the decision of the agency only upon a finding that the decision was clearly contrary to specific provisions of the applicable ordinance(s), or unsupported by substantial evidence in the record.

C. The Board is to conduct appellate reviews under the Chevron or Skidmore review guidelines, or both.

D. The Board must consider whether the evidence presented demonstrates that the agency's decision was "clearly erroneous" or constituted "abuse of discretion".

E. If the Board finds mixed questions of law and fact, it must conduct an "arbitrary and capricious" review.

F. Appellate review matters for which a decision is reversed are remanded to the operative decision agency.

14.6.5 Bases for Zoning Adjustment Appeal/Request Decisions.

No approval may be granted for an application involving a structure, if the structure would be located in an unapproved subdivision, or would violate any other local ordinance or regulation or any state law which the municipality is responsible for enforcing.

14.6.5.1 Conditions for Zoning Adjustment Appeal/Request Consideration.

In addition to the prerequisites of Chapter 14.5, above, when hearing zoning adjustment appeals/requests under this Section, the BoA must also use the following criteria as bases of its decision. The proposed use or its location:

A. Will not prevent the orderly and reasonable use of adjacent properties or of properties in adjacent use zones;

B. Will not prevent the orderly and reasonable use of permitted or legally established uses in its zone, nor of permitted or legally established uses in adjacent zones;

C. Will not adversely affect the safety, health, morals, and welfare of the Town; and

D. The use will be in harmony with, and promote the general purposes and intent, of this Code.

14.6.5.2 Factors for Zoning Adjustment Appeal/Request Consideration.

Among other things, in making such determination, the BoA must also give consideration, to:

A. The character of the existing and probable development of uses in the zone and the peculiar suitability of such zone for the location of any of such uses;

B. The conservation of property values and the encouragement of the most appropriate uses of land;

C. The effect that the location of the proposed use may have upon the congestion or undue increase of vehicular traffic congestion on public streets or highways;

RTC - TITLE 14 APPEALS – ENCLOSURE 3

D. The availability of adequate and proper public or private facilities for the treatment, removal or discharge of sewage, refuse or other effluent (whether liquid, solid, gaseous or otherwise) that may be caused or created by or as a result of the use);

E. Whether the use, or materials incidental thereto, or produced thereby, may give off obnoxious gases, odors, smoke or soot;

F. Whether the use will cause disturbing emission of electrical discharges, dust, light, vibration or noise;

G. Whether the operations in pursuance of the use will cause undue interference with the orderly enjoyment by the public of parking or of recreational facilities, if existing, or if proposed by the Town or by other governmental agency;

H. The necessity for paved off-street parking;

I. Whether a hazard to life, limb or property because of fire, flood, erosion or panic may be created by reason or as a result of the use, or by the structures to be used, or by the inaccessibility of the property or structures thereon for the convenient entry and operation of fire and other emergency apparatus, or by the undue concentration or assemblage of person upon such plot;

J. Whether the use, or the structures to be used, will cause an overcrowding of land or undue concentration of population; or, unsightly storage of equipment, vehicles, or other materials;

K. Whether the plot area is sufficient, appropriate and adequate for the use and the reasonably anticipated operation and expansion thereof;

L. Whether the proposed use will be adequately screened and buffered from contiguous properties;

M. The assurance of adequate landscaping, grading, and provision for natural drainage;

N. Whether the proposed use will provide for adequate pedestrian circulation;

O. Whether the proposed use anticipates and eliminates potential nuisances created by its location;

P. The satisfactory compliance with all applicable performance standard criteria contained in Town Code Title 16, Chapters 16.8 and/or 16.9.

14.6.6 Bases for Special Exception Decisions.

A. The applicant shall submit narrative statements, in writing, which become part of the record of the request, demonstrating substantial evidence that the use requested will:

1. Not have an unreasonably adverse effect on the public health, safety, morals, or welfare of the residents of the area or the general public.
2. Not significantly devalue abutting property or property across a public or private way.
3. Not prevent the orderly and reasonable use of permitted or legally established uses in the zone wherein the proposed use is to be located, or of permitted or legally established uses in adjacent use zones; and,
4. Not have an adverse impact on spawning grounds, fish, aquatic life, or bird or other wildlife habitats;
5. Be in harmony with and promote the general purposes and intent of this Code.
6. Adequately provide for the disposal of all wastewater;

RTC - TITLE 14 APPEALS – ENCLOSURE 3

- 998 7. Conserve shore cover and visual, as well as actual, points of access to inland waters;
- 999 8. Protect archaeological and historic resources as designated in the Comprehensive Plan; and
- 1000 9. Avoid problems associated with floodplain development and use.
- 1001 B. Special exception approvals may be subject to additional conditions as determined by the BoA,
1002 including, but not limited to, the following:
- 1003 1. Front, side or rear yards in excess of minimum requirements;
- 1004 2. Modifications of the exterior features of buildings or other structures;
- 1005 3. Limitations on the size of buildings and other structures more stringent than the minimum or
1006 maximum requirements;
- 1007 4. Regulation of design of access drives, sidewalks and other traffic features;
- 1008 5. Off-street parking and loading spaces in excess of the minimum requirements; or
- 1009 6. Restrictions on hours of operation.
- 1010 C. The Board shall approve the request or approve it with conditions, if it makes a positive finding based
1011 on the information presented that substantial evidence shows that the proposed use will:
- 1012 1. Not have an adverse effect as in A1 above. In making this determination, the Board shall take into
1013 consideration the potential effect of the development on the environment from air, water or soil
1014 pollution; noise; traffic congestion; soil erosion; the burden on sewage disposal or water supply
1015 systems or other municipal facilities, services or public ways; and any other relevant factors.
- 1016 2. Not significantly devalue abutting properties as in A2, above. In making its determination, the
1017 Board shall take into consideration the type of structure proposed; the topography of the area; the
1018 market value of the surrounding real estate; the availability of utilities and transportation; the
1019 availability of schools and hospitals; traffic conditions; and any other relevant factors.
- 1020 3. Not give rise to any grave concern regarding the expectations established in A3-9, above.
- 1021 4. Be subject to such additional conditions from B, above, as the Board deems necessary.
- 1022 D. BoA Special Exception Use approvals must be made contingent upon the Code Enforcement Officer
1023 or Planning Board finding the plan for such use is in conformance with the provisions of Title 16, Land
1024 Use and Development.
- 1025 **14.6.7 Zoning Adjustment Appeal/Request Findings of Fact.**
1026 The summary of facts for all appeal/request decisions must include:
- 1027 • the name of the applicant and relationship to the property;
- 1028 • location of the property;
- 1029 • basic description of the project;
- 1030 • key elements of the proposal (lot size, setback, frontage, and other items which relate directly to
1031 the dimensional requirements or performance standards in the ordinance);
- 1032 • evidence submitted by the applicant beyond what is shown on the plan;
- 1033 • evidence submitted by people other than the applicant either for or against the project; and

RTC - TITLE 14 APPEALS – ENCLOSURE 3

- 1034 • evidence which the Board enters into the record based on the personal knowledge of its members
- 1035 or experts which the Board has retained on its own behalf.

1036 **14.6.8 Zoning Adjustment Appeal/Request Conclusions of Law.**

1037 Such conclusions must include statements linking the specific facts covered in the findings of fact to the
1038 performance standards/review criteria in the ordinance(s) or statute(s) which the applicant must meet in
1039 order to receive the Board's approval.

REPORT to the KITTELY TOWN COUNCIL – TOWN CODE TITLE 4 – draft v1
12/28/15

RESPONSIBLE INDIVIDUALS: Beers

Date: tbd

Subject: Town Code Title 4, Boards, Commissions, and Committees

STATEMENT OF NEED:

To give due and proper attention to its many demands of Town governance pursuant to Federal law, Maine Revised Statutes, and the Town Charter; make provision for citizen participation in community affairs to provide for that range of requirements; and, establish, compose, and appoint members of boards, harbor authority, commissions, and committees ("Boards") to serve the Town of the Kittery for those purposes.

To address the terms and conditions for the establishment, appointment, composition, powers, duties and administrative obligations of its Boards; and

To address the application, selection procedures, qualifications, terms of service, and dismissal procedures of members appointed to its Boards; and

In order that:

A. Boards always have available to them candidates for membership who are qualified for the unique needs of that Board.

B. Each Board maintains the independent posture needed to encourage the free and open dialogue crucial to its function; and

C. All volunteers for Boards are shown the appreciation of the community regardless of whether or not they are appointed to a particular Board.

FACTS BEARING ON THE EQUATION:

Maine Revised Statutes: *(not enclosed)*

- 1 MRS §71 and §402
- 12 MRS §6621 and §6671
- 21-A MRS §101 and §103
- 30-A MRS §2001, §2605, §2691, and §3261
- 36 MRS §843
- P&SL 1961, Chapter 163, as amended

Town Charter:

- §2.07; §5.02; §7.02; §7.04; §8.01; §8.04; §12.01; and, §12.02

BACKGROUND: *(attachments not enclosed for Workshop)*

- Present Title: Ordainment 07/26/2010, Amended 7/25/11, 9/12/11, 11/10/14, 4/27/15 *(atch 1)*
- Current Boards / Appointments *(atch 2)*
- Council Committee addressed issues *(atch 3)*
- Title 16 – Land Use & Development - Board Provisions *(atch 4)*
- Wildes Trust Ordinance *(atch 5)*
- Lincoln Memo on Planning Board Appointments *(atch 6)*
- Equivalency Guide Example *(atch 7)*

The present Title 4, as reflected therein *(atch 1)* and displayed the Current Boards listing *(atch 2)*:

Does not:

- address some existing Boards
- have a consistent approach to Board powers and duties

REPORT to the KITTERY TOWN COUNCIL – TOWN CODE TITLE 4 – draft v1
12/28/15

- provide a similar treatment basis for statutory, charter, and ordinance established boards
- address/clarify protocols for Boards formed ad hoc or working groups
- consistently define terms, service, qualifications, dismissal, or disqualification provisions
- address administrative practices and procedures in common
- demonstrate statutory bases for purposes in many cases
- clearly convey the parameters of candidate evaluation criteria

Has:

- repetitive redundant provisions applicable to all included in most sections
- some inconsistencies in application, interview, and selection procedures
- an ambiguous interview/selection process for Appeals/ Planning Board appointments
- inconsistent establishment, appointment, and composition provisions

Note 1: The Planning Board, Board of Appeals, and Port Authority provisions found in Title 16 (*atch 4*) were created in 1991's first unified Land Use Code because Title 4 did not exist at the time, and it was necessary to ordain the powers and duties of those Boards with regard to land use responsibilities. Those particular requirements should remain in Title 16, however it is recommended that language related to their establishment, appointment, and composition, be published in Title 4 where all other necessary features are found.

Note 2: The Council Committee's Item 10 (*atch 3*) suggests removing the selection procedures to a Council Policy. Although no revisions were made for recodification, they were placed in Title 4 to preclude random revision that risked inconsistency in legislative application. Council rules require two weeks to make amendments and the 30-day period for ordinance is not onerous. Should circumstances dictate, Council has emergency ordinance authority.

CURRENT SITUATION: (*enclosures 2-4 – not included for Workshop*)

"Strikeout/underscore" (*encl 1*) and "accepted" (*encl 2*) drafts provided for review are intended to resolve those issues.

- Highlighted passages require attention for resolution
- Town Attorney providing BoA/PB interview process clarification (*tbd*)
- The Wildes Trust ordinance provisions should be reviewed and affirmed/revised (*atch 5*)
- Mr. Lincoln's recommendation for PB appointments should be considered (*atch 6*)
- Education, training, experience equivalency should be incorporated (*atch 7*)

Drafts are in due form and proper format with enactment findings of fact, basis of law, and legislative intent delineated (*encl 3*) and satisfy all statutory obligations. A revised index is provided (*encl 4*).

RECOMMENDATIONS: Consider revision to Title 4, Boards, Commissions and Committees

ATTACHMENTS

- a1. Title 4 - Boards, Commissions & Cmttees 4-27-15
- a2. Current Boards / Appointments
- a3. Committee on Appointments Memo 031715
- a4. Title 16 – Land Use - Board Provisions
- a5. Wildes Trust Ordinance
- a6. Lincoln Memo on Planning Board Appointments
- a7. Equivalency Guide Example

ENCLOSURES

- e1. Title 4 Boards - ORC v1 - S-0 - 112115
- e2. Title 4 Boards - ORC v1 - Acptd - 112115
- e3. Title 4 - ORC – Enact
- e4. Title 4 Boards - ORC v1 – Index

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57	4.10.1 Establishment, Appointment and Composition.	
58	4.10.2 Powers and Duties.	
59	NOTE: Following included for information only:	
60	KITTELY PORT AUTHORITY, PRIVATE AND SPECIAL 1961, Chapter 163, as amended	

Title 4 BOARDS, AUTHORITY, COMMISSIONS and COMMITTEES

Chapter 4.1 ESTABLISHMENT

Town governance requires attention to many demands pursuant to Federal law, Maine Revised Statutes, and the Town Charter. In order to provide for that range of requirements and make provision for citizen participation in community affairs the ~~Boards~~boards, authority, commissions, and committees (hereafter “Boards”), addressed herein, are hereby established and/or defined.

4.1.1 Objectives.

There are certain general objectives critical to the successful functioning of Council-appointed Boards among these are:

A. That Boards always have available to them candidates for membership who are qualified for the unique needs of that Board.

B. That each Board maintain the independent posture needed to encourage the free and open dialogue crucial to its function; and

C. That all volunteers are shown the appreciation of the community regardless of whether or not they are appointed to a particular Board.

4.1.2 General Provisions.

4.1.2.1 Terms.

A. The Council has the power to appoint all members of boards created by statute, ordinance, Town charter, or by Council action unless otherwise provided therein.

B. Members of Boards serve terms as established by statute, charter, or this ordinance. Statutory Board members serve until their successors are appointed and qualified; and, all others until expiration of their term, unless reappointed. Term limits are those set in the Town Charter.

C. No member of a Board may be employed by the town, nor hold or be a candidate for any elective office. Town employees may not be appointed to a Board, except where the Town Charter, ordinance, or Council action, establishes ex officio membership where an incumbent serves during their tenure in such position. Municipal officers or officials, or a spouse thereof, may not serve as Board members.

D. Member terms are to be staggered for expiration, as established. Service for more than one-half of a term is considered a full term for the purpose of calculating term limits. Vacancies occurring during a term are filled by Council for the balance of the term.

E. All terms expire on the same date in their respective years. For the purpose of aligning term ending dates, the Council may make appointments in excess of three (3) years, but no more than four (4) years, except where differing statutory provisions apply.

F. Members of the Boards serve without compensation, but funds will be provided for reasonable and necessary expenses.

G. Pursuant to Town Charter §2.07, Council has the power to remove for cause after notice and hearing, all members of boards created by statute, Town Charter, ordinance, or by Council action unless otherwise provided therein. A member of the Board may be dismissed for cause by the Town Council before the expiration of such member's term after notice and hearing.

4.1.2.2 Qualifications, Service, Dismissal.

A. All appointments of voting members, regular and/or ad hoc, are made from among the qualified resident voters of the town and each appointee during term of office must remain a qualified resident voter in order to retain appointment.

B. Non-residents may be appointed to non-statutory boards, committees, or work groups, without voting privileges; and, the establishment provision of Boards with ex officio membership is to state whether voting privileges are authorized.

C. As defined in as defined by 30-A MRS §2001, Definitions, Board members are municipal officials of the Town and are obliged to honor Town Charter §12.02, Code of ethics and prohibited conduct. Any person who violates any of the provisions of §12.02 shall forfeit office or position and be ineligible for a period of five (5) years thereafter to hold any town office or position.

D. In addition to provisions set forth in 30-A MRS §2605, Conflicts of interest, pursuant to Town Charter §12.01. Financial conflict of interest, all town officials shall attempt to avoid an actual or perceived financial conflict of interest by abstention or disclosure. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting thereon is decided by a majority vote of the members present, except the member who is being challenged, who may not vote on the issue.

E. Members of Boards with quasi-judicial authority to render decisions which may be appealed to the judicial system are further constrained, as follows:

1. Bias.

(a) Bias occurs where a Board member, due to prejudice or a relationship with the applicant, is considered unable to make a fair and impartial decision in a matter requiring objectivity. A fair and impartial decision-maker is an integral component of procedural due process and a decision made in the absence of this component may be constitutionally deficient.

(b) 1 MRS §71, Laws, (6) Disqualification, states that Board members must disqualify themselves if a situation requires that member to be disinterested or indifferent and the member must make a decision which involves a person to whom the member is related by blood, cohabitation, or marriage, within the sixth (6th) degree (parents, grandparents, great-grandparents, great-great grandparents, brothers, sisters, children, grandchildren, great-grandchildren, aunts, uncles, great aunts/uncles, great-grand aunts/uncles, first cousins, first cousins once removed, first cousins twice removed, second cousins, nephews, nieces, grand-nephews/nieces, great grandnephews/nieces).

(c) Various court decisions also have established a rule requiring a Board member to abstain from the discussion and the vote if members are so biased against the applicant or the project that they could not make an impartial decision, thereby depriving the applicant of the due process right to a fair and objective hearing.

2. Ex Parte Communications.

(a) An ex parte communication is a written or oral communication regarding the subject matter of a proceeding which occurs between the decision-maker and one party to the proceeding without the other party's presence or notice. 30-A M.R.S. §2691, states "every party ... [has] the right to present the party's case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct any cross-examination that is required for a full and true disclosure of the facts."

(b) An ex parte communication interferes with these rights because it deprives the party of the

opportunity to address the evidence which the Board has considered in rendering a decision and must be completely avoided by Board members.

4.1.3 Board Administration.

A. Boards shall set and publish agendas and hold meetings to perform duties. Agendas will be posted at Town Hall and the post offices, and to the Town website, seven (7) days in advance of meeting days. Meeting minutes will be kept and when approved, copies provided to Council and posted to the Town website.

B. Regular and Special meetings, as well as workshops addressing business of the Town, of [certain] Boards are to be broadcast via live via local cable channel television and/or streaming video. Ad hoc and work groups are encouraged to have their regular sessions “live streamed”. Board sessions for training or “brainstorming” need not be broadcast.

C. All records of the Boards are public records, except as excluded under 1 MRS §402, Definitions, §§(3) (A)-(O), the Maine Freedom of Access (Right to Know) statute.

D. Boards are to keep their purpose, powers, and duties under review and make recommendations for revisions or amendments to Council, as may be appropriate; and, to submit an annual report covering the above topics and all other committee activities, to Council as well as to state agencies where appropriate.

Chapter 4.2 SELECTION PROCEDURES FOR COUNCIL APPOINTMENTS

4.2.1 Purpose.

~~When subject to council~~Council appointment, members of Town Boards, which term includes authority, commission, committee (both standing and ad hoc), and trust are to be selected using the following procedures.

~~4.2.2 Objectives.~~

~~There are certain general objectives which are critical to the successful functioning of council-appointed Boards among these are:~~

~~A. That Boards always have available to them candidates for membership who are qualified for the unique needs of that Board.~~

~~B. That each Board maintain the independent posture needed to encourage the free and open dialogue crucial to its function; and~~

~~C. That all volunteers are shown the appreciation of the community regardless of whether or not they are appointed to a particular Board.~~

~~4.2.3 Procedures.~~

~~To achieve these goals, the following procedures for the selection of Board members are adopted:~~

4.2.2 Application.

A. A list of applicants for each Board will be maintained by the Town Clerk.

B. Volunteers must complete an application for each Board they wish to serve. Applicants will be listed in order by the date-time of receipt of the completed application by the Town Clerk.

C. Applicants are eligible to serve only one primary board at a time (unless acting as an official designee to another board). Primary boards are defined as follows: Board of Appeals, Board of Assessment Review, Capital Improvement Program, Conservation Commission, Parks

Commission, Planning Board, and Port Authority. All other boards are considered secondary. Service on secondary boards is limited to no more than ~~three~~three (3).

~~C. No Town employees may be appointed to a Board, except when attendance is required in their official capacity.~~

D. A member whose term is expiring is given consideration for reappointment first, subject to term limitations for the position, if any. ~~Service for more than one-half of a term is considered a full term for the purpose of calculating~~ Alternates or associates on a Board will be given first consideration for appointment when an opening occurs, in order of length of service.

E. Applicants will be polled for interest for serving on a board when an opening occurs. Those refusing declining may opt to remain on the list and will be placed back on the list as of the date of declining.

4.2.3 Interview and Appointment.

~~A~~F. Council may waive the interview requirement for reappointments; alternates applying for full membership; and full members applying for alternate status.

~~B~~G. With the exception of the Planning Board and Board of Appeals, eligible applicants are interviewed for a specific Board appointment prior to consideration by the full Council.

1. The interview is conducted by the Chairperson (or designated regular member) of the applicable Board and by one Council member designated by the Council. Councilor interviewing assignments are rotated so that no one Councilor would be involved in successive interviews for the same Board.

In event neither the Board Chairperson, nor designated ~~permanent~~regular member, is available, the sitting Council may determine an alternate interview protocol.

2. Interviews are considered private.

3. Only one interview is conducted with each applicant for each position.

4. Both interviewers must agree to the acceptability of the candidate in order for that candidate's name to be considered by the full Council.

5. Applicants not recommended to the Council may opt to remain on the list(s) if they so desire. They must notify the Town Clerk in writing of their interest within one week of being notified of the non-appointment, and they will be placed at the bottom of the list. Otherwise, they will be removed from the list.

~~H~~C. The following criteria are used in evaluating candidates:

1. Education,

~~2. Training, and experience:~~ consider any Board-function related experience that will provide the candidate the necessary knowledge, skill, and abilities to be able to perform the functions of the Board proficiently.

~~3. Other-~~ Related experiences.

~~4.~~ Any potential for conflict of interest.

~~5.~~ For reappointments or changes from aAlternate to ~~Full~~regular mMember, attendance (rated as 'Excellent', 'Good', or 'Poor') is to be provided by the Chairperson of the Board on the interview form.

~~I. Any appointed Board member may be dismissed for cause by the Town Council.~~

pursuant to Section 2.07 (1) of the Town Charter.

4.2.4 Planning Board or Board of Appeals Interviews and Appointments.

A. Pursuant to Town Charter §2.07(2), applicants for the Planning Board and Board of Appeals must be interviewed by the Council, at a Regular or Special meeting, with at least a quorum present, before any vote is taken on the appointment. ~~A. Applicants will be interviewed for the Planning Board or Board of Appeals with at least a quorum present at a regular or special Council meeting. If there are multiple applicants for a Board, they will be interviewed by Council as a group including applicant(s) already interviewed.~~

B. Criteria listed in Section 4.2.3 ~~H2.2C~~, above, must also be used in considering candidates for the Planning Board and the Board of Appeals.

C. After the interviews are completed, Council, in open session, and by the following meeting, shall nominate, with a second, discussion and vote on the candidate(s) for the open vacancy.

D. A tie vote on an appointment shall be voted on by Council twice. Following the second tie vote the Council Chairperson shall determine the winner by lot by a coin toss. TIE = DATE OF APPLICATION? BY LOT? DRAW STRAWS.

E. Interviewed applicants not appointed may remain on the list if they so desire. They must notify the Town Clerk in writing of their interest within one week of being notified of the non-appointment, and they will be placed back on the list. Otherwise, they will be removed from the list.

~~4.2.5 Appointment Exceptions.~~

~~A. Building Committee — when Council-appointed membership is involved, appointment procedure is determined by the sitting Council.~~

~~B. Charter Commission — procedure is determined by the sitting Council.~~

~~C. Christmas Parade Committee — members recommended by sponsoring group.~~

~~D. Rice Public Library Board of Trustees — application and interview procedure applies, but appointment is made by Library Trustees.~~

~~E. Newly-formed Boards not existing as of November 1, 2000 — procedure is determined by the sitting Council.~~

~~4.2.6 Other Appointments.~~

~~A. Town Manager, including related positions held by Manager: Interview by Council as part of hiring procedure.~~

~~B. Individual positions not enumerated: Procedure determined by sitting Council.~~

Chapter 4.3 STATUTORY BOARDS

4.3.1 REGISTRAR OF VOTERS

4.3.1.1 Establishment, Appointment, and Composition.

Pursuant to 21-A MRS §101, Registrar, et seq, Council shall appoint in writing a qualified Registrar of voters by January 1st of each odd-numbered year. The Registrar shall serve for two (2) years and until a successor is appointed and sworn.

The Registrar may appoint one or more deputies sufficient to accomplish necessary tasking who serve indefinite terms at the will of the registrar.

The Registrar must be a citizen of the United States, a resident of the State and at least 18 years of age. The Registrar may not be an employee of a party or candidate or be an officer of a municipal, county or state party committee. In the electoral division in which the Registrar is appointed, the Registrar may not:

A. Hold or be a candidate for any state or county office;

B. Be a treasurer for a candidate; or

C. Be a municipal officer as defined by 30-A MRS §2001, Definitions.

4.3.1.2 Powers and Duties.

The Registrar has the exclusive power to determine whether a person who applies for registration as a voter meets the qualifications prescribed by 21-A MRS Elections, subject to §103 (see following).

4.3.2 REGISTRATION APPEALS BOARD

4.3.2.1 Establishment, Appointment, and Composition.

A. Pursuant to 21-A MRS §103, Registration appeals board, et seq, the Board consists of three (3) members who must be appointed as follows:

The Town committee of each of the major political parties shall nominate one member, who must be enrolled in the party of the Town committee that nominates the member, and Council shall appoint the persons nominated by the Town committees and the third member must be nominated by the Town Clerk and appointed by the Council.

The Town Clerk may give the Town committees of the political parties a list of qualifications necessary for a person to fulfill the duties of the Board, and the Town committees shall take those qualifications into consideration when nominating members to the Board.

The two (2) members of the Board nominated by the Town committees of the major political parties may be members of the Town committee nominating them and of the county or state committees of the political party that nominates them and may be members of a state or county delegation to a political convention.

When a Town committee nominates a member to the Board, it shall also nominate an alternate member, who serves if the member nominated by the Town committee is or becomes unable to serve.

B. The Town Clerk may not serve as a member or alternate member of the registration appeals board.

C. Each member nominated by the Town committees of the major political parties and appointed to the Board shall serve for three (3) years and the member nominated by the Town Clerk and appointed to the Board shall serve for 4 years.

D. The member nominated by the Town Clerk is chairman of the board.

E. When there is a vacancy on the Board, the alternate board member nominated by the Town committee of the political party of the former incumbent shall serve. If an alternate is not available, Council shall appoint a qualified person nominated by the Town committee of the party of the former incumbent to fill the vacancy. If the vacancy is in the office of the chair of the board, Council shall appoint a qualified person nominated by the Town Clerk to fill the vacancy.

4.3.2.2 Powers and Duties.

A. Appeal hearing. Upon receipt of a complaint by a person aggrieved by the decision of the

Registrar, the Chair of the Board shall immediately fix a time and place for the Board to meet for a prompt hearing. The voter must be given written notice of the hearing at least 20 days in advance and must have the opportunity to testify and to present witnesses and other evidence at the hearing. The hearing is de novo. After hearing, the Board may affirm, modify or reverse the decision of the Registrar of Voters. The Board shall issue the decision to the voter in writing and provide information on how the voter may appeal the decision. The aggrieved person may appeal the decision of the Board to the Superior Court in accordance with Rule 80B of the Rules of Civil Procedure.

B. Actions of the registration appeals board. The Board may only act by unanimous or majority action.

4.3.3 BOARD OF ASSESSMENT REVIEW

4.3.3.1 Establishment, Appointment, and Composition.

The Board of Assessment Review is established pursuant to Town Charter §7.02, consisting of three (3) members and two (2) alternates, not otherwise connected with town government, who shall be appointed as hereinbefore provided for a term of three (3) years.

4.3.3.2 Powers and Duties.

A. Pursuant to 36 MRS §843, Appeals, et seq, and Town Charter §7.04, the Board is conferred upon it such powers of review and abatement as are conferred upon Boards of Assessors by statute, and has the power to:

(1) Review on complaint of property owners, and revise assessments for the purpose of taxation of real and personal property within the town limits made by the Town assessor;

(2) Administer oaths;

(3) Hold hearings; and

(4) Adopt regulations regarding the procedure of assessment review, not inconsistent with statutory provisions.

B. If the Town Assessor refuses to make the abatement asked for, an applicant may apply in writing to the Board within 60 days after notice of the decision from which the appeal is being taken or after the application is deemed to have been denied, and, if the Board thinks the applicant is over-assessed, the applicant is granted such reasonable abatement as the board thinks proper.

C. Except with regard to nonresidential property or properties with an equalized municipal valuation of \$1,000,000 or greater either separately or in the aggregate, either party may appeal from the decision of the Board directly to the Superior Court, in accordance with Rule 80B of the Maine Rules of Civil Procedure. If the Board fails to give written notice of its decision within 60 days of the date the application is filed, unless the applicant agrees in writing to further delay, the application is deemed denied and the applicant may appeal to Superior Court as if there had been a written denial.

4.3.4 PERSONNEL BOARD

4.3.4.1 Establishment, Appointment, and Composition

The Personnel Board is established pursuant to Town Charter §5.02(3)(a), consisting of five (5) members and two (2) or more alternates appointed as hereinbefore provided for three (3) year terms.

4.3.4.2 Powers and Duties.

A. It is not the Personnel Board’s function to exclusively represent the interests of an employee or the employer; it is the Board’s function to fairly and impartially represent the interests of both parties and to clearly and continually work for the development of mutual respect, understanding, and cooperation between the parties.

B. The Board is to:

1. Advise the Town Manager on matters of personnel policy and problems of personnel administration, including the development of personnel rules, a job classification plan, and a uniform pay plan;

2. Represent the public interest in the improvement of personnel administration in the Town service;

3. Make any inquiry which it may consider desirable concerning personnel administration in the Town service, and make advisory recommendations to the Town Manager, with respect thereto.

C. As delineated in Town Charter §5.02(3 (b), the Board shall:

1. Assist the personnel director in developing and updating an administrative code;

2. Advise the personnel director on issues of personnel management; and

3. Act as an appeals or grievance board involving employees covered by Town Code Title 2 in the manner and under the provisions specified therein.

4. All opinions and decisions issued by the Board are advisory in nature and are issued to the Town Manager and to the employee(s) requesting the grievance hearing or separation/demotion hearing.

4.3.5 PLANNING BOARD

4.3.5.1 Establishment, Appointment, and Composition.

A. The Planning Board is established pursuant to Town Charter §8.01, consisting of seven (7) members appointed as hereinbefore provided and serve terms of three (3) years.

B. No member may serve more than three (3) consecutive terms of three (3) years. Any member who has served three (3) consecutive terms of three (3) years is ineligible to serve on the board for a period of one year. Computation of term limits does not include terms of fewer than three (3) years after their effective date.

4.3.5.2 Powers and Duties.

The Board has such powers and performs such duties as provided by law and as delineated in Town Code Title 16 §1.4.

4.3.6 BOARD OF APPEALS

4.3.6.1 Establishment, Appointment, and Composition.

A. The Board of Appeals is established pursuant to Town Charter §8.04, consisting of seven (7) members appointed as hereinbefore provided and serve terms of three (3) years.

B. No member may serve more than three (3) consecutive terms of three (3) years. Any member who has served three (3) consecutive terms of three (3) years is ineligible to serve on the board for a period of one year. Computation of term limits does not include terms of fewer than three (3) years after their effective date.

330 **4.3.6.2 Powers and Duties.**

331 The Board has such powers and performs such duties as provided by law and as delineated in
332 Town Code Title 16 §1.5.

333 **Chapter 4.34 MUNICIPAL BOARDS**

334 **4.4.1 Boards Established.**

335 Some advisory committees are formed by a board of directors to work on a specific issue or
336 challenge. Such working groups may serve only until the specific issue is resolved, at which
337 point recommendations are made to board and staff, and the group dissolves. However,
338 organizations often see the benefit of establishing a permanent advisory board or committee to
339 provide ongoing support

340 **4.4.2 Ad Hoc Committees.**

341 Non-statutory Ad Hoc Boards established herein (dealing with a specific subject, purpose, or
342 end) are considered permanent advisory boards to provide ongoing support, strategic direction,
343 and to be advocates for the initiatives involved.

344 Committees formed Ad Hoc (for a special purpose or end presently under consideration) to deal
345 with particular matters such as an Educational Scholarship Selection Program; a Capital
346 Improvement Program; a Comprehensive Plan Update; Shared Services; or Economic
347 Development, are to be established and charged with appropriate provisions similar to those
348 found herein and contain an end of task 'sunset' clause.

349 Committees formed ad hoc of longstanding service should be considered for permanent
350 codification in this code.

351 **4.4.3 Working Groups.**

352 Council may from time to time determine a need for a small group of individuals to review and
353 report, which may include recommendations, on particular issues, usually of short-term interest.
354 The procedure for creating and direction such is to be determined by the sitting Council and on
355 completion of its charge the group dissolves. The Town Manager may establish similar advisory
356 bodies for dedicated purposes, such as an Open Space or Energy Advisory Committee.

357 **4.4.4 Other Appointments.**

358 A. Building Committee – when Council-appointed membership is involved, appointment
359 procedure is determined by the sitting Council.

360 B. Charter Commission – procedure is determined by the sitting Council.

361 C. Christmas Parade Committee – members recommended by sponsoring group.

362 D. Rice Public Library Board of Trustees – application and interview procedure applies, but
363 appointment is made by Library Trustees.

364 E. Individual positions not enumerated: Procedure determined by sitting Council. ~~BOARD-OF-~~
365 ~~ASSESSMENT REVIEW~~

366 **4.3.1 Created – Powers.**

367 ~~The Board of Assessment Review is created pursuant to Article VII of the Town Charter and~~
368 ~~exercises the powers conferred by that Article.~~

369 **4.3.2 Membership.**

Qualifications of member, their appointment and terms, is governed by Article VII of the Town Charter. Members serve until their successors are appointed and qualified.

Chapter 4.45 KITTErY COMMUNITY CENTER BOARD of DIRECTORS

4.45.1 Establishment, Appointment, and Composition.

A. Pursuant to the provisions of the Town Charter, Section 2.07(1), the Town Council establishes a Board of Directors for the Kittery Community Center at Frisbee Common is established to oversee those aspects of Center operations and facilities as delineated in this Chapter.

B. The Board consists of nine (9) voting members appointed as hereinbefore provided. Seven (7) are Kittery residents, serving staggered terms of office of three (3) years each, plus the Town Manager and a Council-appointed Town Councilor. The Recreation Director and Town Planner are ex officio members without voting rights.

C. Resident appointments are to be comprised of individuals with demonstrable experience or association with recreation (3); arts and culture (2); economic or community development (1); plus a member-at-large (1).

~~D. The initial appointment of one recreation member, one arts and culture member, and the economic or community development member are for three years. The second recreation and arts and culture initial appointments are for two years, with the remaining two appointments for one year. All subsequent resident appointments, or reappointments, are to be for three year periods, except as provided in 4.4.1 I.~~

~~E. Members of the Board are appointed by the Town Council.~~

~~F. Municipal officers or officials, or a spouse thereof, may not serve as a resident member of the Board.~~

~~G. Members serve until their successors are appointed and qualified.~~

~~H. A member of the Board may be dismissed for cause by the Town Council before the expiration of such member's term after notice and hearing.~~

~~I. Vacancies are filled by Town Council appointment for the unexpired term.~~

4.54.2 Powers and Duties.

A. The Board shall elect annually a chairperson, vice chairperson, and secretary from its membership. It is the duty of the secretary to keep and maintain a permanent record of all meetings of the Board, and show the vote of each member upon each question.

B. A quorum consists of five (5) or more members. All decisions must be made by a minimum of five (5) like votes, except on procedural matters.

C. The Board shall propose bylaws for Town Council adoption to govern routine Board proceedings.

~~D. The Board shall set agendas and hold meetings to perform duties.~~

~~E. Any question of whether a particular issue involves a conflict of interest sufficient to disqualify a member from voting thereon is decided by a majority vote of the members present, subject to 4.4.2 B above, except the member who is being challenged, who may not vote on the issue.~~

~~F. All records of the Board are public records, except as excluded under 1 M.R.S. §402 (3).~~

(A)-(O), the Maine Freedom of Access (Right to Know) statute.

G. The Board is to:

1. Prepare and recommend a Long Range (5-Year) Community Center Development Plan for Council adoption, updated annually, and monitor and report on Plan implementation progress;

2. Develop operational policies, and approve operating procedure protocols recommended by administration;

3. Review and endorse an annual operating budget proposal for operations and facilities maintenance developed by administration;

4. Develop and annually recommend a Capital Program to the Capital Improvement Program Committee; and

5. Report quarterly for the first year of operation, then annually or at such intervals as the Town Council may direct thereafter, on programs, use, growth, and new activity at the Center. Such report may include elements to satisfy the Plan implementation progress report.

~~Chapter 4.5~~ **REGISTRATION APPEALS BOARD**

RESERVED

Chapter 4.6 BOARD OF TRUSTEES of TRUST FUNDS

4.6.1 Establishment, Appointment, and Composition. ~~Created Duties.~~

A Board of Trustees of trust funds is ~~created~~ established to have the care and management of the Mary Stafford Wildes Estate Trust, or any other similar funds.

4.6.2 Membership.

The ~~B~~board consists of ~~five~~ five (5) members, the ~~C~~chairperson of the ~~town council~~ Council and the ~~T~~town ~~C~~clerk to be ex officio members and the ~~e~~clerk to be treasurer of said fund, and ~~three~~ three (3) additional members to be appointed as hereinbefore provided by the moderator for one, two and three years respectively; and hereafter each year one member is to be appointed by the Town Council for a three-year term and thereafter for successive three-year terms. Appointed members serve until their successors are appointed and qualified. Appointed member vacancies are filled by town council appointment for the unexpired term.

4.6.2 Powers and Duties.

The Board has the authority to administer said trust funds in accordance with the terms of the will, as follows, or other document creating such trust.

Accepted by Annual Town Meeting voters, 51st Item, March 7, 1953:

“WILL: This third to finally be used with the remaining third to be given to the Town of Kittery, Maine for some worthy charitable benefit needed in that town not connected with any outside organization and preferably the Town Home for the Poor or assistance of natives of the town, my own family relatives to be considered first if any are living and in need of help.”

~~Chapter 4.7~~ **PERSONNEL BOARD**

~~4.7.1~~ **Established Composition, Qualifications, Terms, Removal, Compensation of Members, Filling of Vacancies, Duties Generally.**

~~A Personnel Board is established, consisting of five members appointed by the Town Council. A~~

personnel board is established, consisting of five members appointed by the Town Council. No member of the Board may be employed by the town, nor hold or be a candidate for any elective office. Members of the Board serve terms of three years and until their successors are appointed and qualified provided, however, that of the members originally appointed, one shall serve for a term of one year, two for a term of two years, and two for a term of three years. All terms expire on the same date in their respective years. Members serve conditioned only upon good behavior and may be removed for cause after notice and hearing. However, no member of the Board may serve for more than two consecutive three-year terms. Vacancies occurring during a term are filled by the Town Council for the balance of the term. Members of the Board serve without compensation, but funds will be provided for reasonable and necessary expenses. The Board elects its own chairperson. In addition to the duties set forth elsewhere in this chapter, the Board is to:

1. Advise the Town Manager on matters of personnel policy and problems of personnel administration, including the development of personnel rules, a job classification plan, and a uniform pay plan;
2. Represent the public interest in the improvement of personnel administration in the Town service;
3. Make any inquiry which it may consider desirable concerning personnel administration in the Town service, and make advisory recommendations to the Town Manager, with respect thereto.

4.7.2 Personnel Board Responsible for Hearing Grievances.

The Personnel Board is responsible for hearing grievances involving employees covered by this chapter in the manner and under the provisions specified by this chapter.

4.7.3 Opinions and Decisions of Personnel Board.

All opinions and decisions issued by the Personnel Board are advisory in nature and are issued to the Town Manager and to the employee(s) requesting the grievance hearing or separation/demotion hearing.

4.7.4 Function of Personnel Board Generally.

It is not the Personnel Board's function to exclusively represent the interests of the employee or the employer; it is the Board's function to fairly and impartially represent the interests of both parties and to clearly and continually work for the development of mutual respect, understanding, and cooperation between the parties.

Chapter 4.87 SHELLFISH CONSERVATION COMMITTEE

4.7.1 Establishment, Appointment, and Composition.

Pursuant to 12 MRS §6671, Municipal shellfish conservation programs, et seq, ~~t~~The Sshellfish Conservation program for the town is administered by the shellfish conservation Committee is established consisting of ~~seven~~seven (7) full-regular members and ~~two~~two (2) alternate members appointed as hereinbefore provided by the Town Council for terms of ~~three~~three (3) years. Members serve until their successors are appointed and qualified. Vacancies are filled by town council appointment for the unexpired term.

4.7.2 Powers and Duties.

Amongst other statutory powers and duties, ~~T~~the Committee's responsibilities include:

- A. Establishing annually, in conjunction with the department of marine resources, the number of

492 shellfish digging licenses to be issued;

493 | B. Surveying each clam-producing area at least once every ~~three~~three (3) years to establish
494 size distribution and density and annually estimating the status of the Town's shellfish
495 resources;

496 C. Submitting to the Town Council proposals for the expenditures of funds for the purpose of
497 shellfish conservation;

498 | ~~D. Keeping this chapter under review and making recommendations for its amendments;~~

499 | ED. Securing and maintaining records of shellfish harvest from the Town's managed shellfish
500 areas and closed areas that are conditionally opened by the department of marine resources;

501 | FE. Recommending conservation closures and openings to the Town Council in conjunction
502 with the area biologists of the department of marine resources;

503 | ~~G. Submitting an annual report to the municipality and the department of marine resources
504 covering the above topics and all other committee activities.~~

505 F. Within any area of the Town, a shellfish conservation ordinance may:

506 (1) Regulate or prohibit the possession of shellfish;

507 (2) Fix the amount of shellfish that may be taken;

508 (3) Provide for protection from shellfish predators;

509 (4) Authorize the municipal officials to open and close flats under specified conditions; and

510 (5) Specify areas of the intertidal zone in which the dragging of mussels may be limited to the
511 degree necessary to support a municipal shellfish conservation program; and

512 (6) Must limit the size of soft-shell clams in accordance with article 5: and

513 (7) Except as provided in 12 MRS §6621, Closed areas, §§3.C, not allow surveying, sampling
514 or harvesting of shellfish in areas closed by regulation of the commissioner.

515 **Chapter 4.98 CONSERVATION COMMISSION**

516 **4.98.1 Establishment, Appointment and Composition**~~Appointment-Purpose.~~

517 Pursuant to the provisions of 30-A, M.R.S. MRS §3261, Conservation commissions, the Town
518 Council is to appoint a Conservation Commission is established consisting of at least three (3),
519 but not more than seven (7), members appointed as hereinbefore provided, for the protection
520 and use of the natural resources located within the territorial limits of the Town.

521 The Commission may recommend to Council that associate members be appointed to assist the
522 Commission as the Commission may require. Associate members are nonvoting members,
523 except when a quorum is absent.

524 **4.98.2 Powers and Duties.**

525 **4.8.2.1 Powers.**

526 The Commission may:

527 A. Make recommendations for use of land to the planning Board and park commission;

528 B. Prepare and print books, charts, maps, and plans as it deems necessary;

529 C. Serve as an advisory body to the public works department to review and advise, at least
530 twice a year, at the call of the Town Manager, in conjunction with the management plan and

maintenance of public parks and shade trees in public parks;

D. With the approval of Council, apply for grants or receive gifts in the Towns name for any of the Commission’s purposes and to administer these grants or gifts for those stated purposes, as specified by the terms of the grant or gift consistent with all appropriate state statutes

E. Develop and implement a management plan for Rogers Park with approval of the Town Council.

4.8.2.2 Duties.

The commission is to:

A. Keep an index of all open areas within the ~~municipality~~ Town, whether publicly or privately owned, including open marshlands, swamps and other wetlands, for the purpose of obtaining information relating to the proper protection, development or use of those open areas.

The ~~Ce~~commission may recommend to the ~~municipal officers~~ Council, or any municipal body or Board, or any body politic or public agency of the state, a program for the better protection, development or use of those areas, which may include the acquisition of conservation easements;

B. Conduct research, in conjunction with the Planning Board, Parks Commission, or Open Space Advisory Committee, into the local land areas; and

~~C. Keep records of its meetings, finances and activities and make an annual report to the municipality; and~~

~~D~~C. Seek to coordinate the activities of conservation bodies organized for similar purposes.

4.9.3 Powers.

The Commission may:

~~A. Make recommendations for use of land to the planning Board and park commission;~~

~~B. Prepare and print books, charts, maps, and plans as it deems necessary;~~

~~C. Serve as an advisory body to the public works department to review and advise, at least twice a year, at the call of the Town Manager, in conjunction with the management plan and maintenance of public parks and shade trees in public parks;~~

~~D. With the approval of the majority of the Town Council, receive gifts in the municipality’s name for any of the commission’s purposes and administer the gift for those purposes, subject to the terms of the gift; acquire land or easements and trusts, and accept gifts of land or money or easements, for conservation purposes; and~~

~~E. Develop and implement a management plan for Rogers Park with approval of the Town Council.~~

4.9.4 Membership.

~~A. The town council may appoint at least three, but not more than seven, conservation commissioners. The commissioners are selected from the qualified resident voters of the town. Members are initially appointed for terms of one, two and three years, such that the terms of approximately one third of the members will expire each year. Their successors are appointed for terms of three years each. Members serve until their successors are appointed and qualified. Vacancies are filled by town council appointment for the unexpired term.~~

~~B. The Commission may recommend to the municipal officers that associate members be~~

appointed to assist the Commission as the Commission requires. Associate members are nonvoting members, except when a quorum is absent. Their terms of office are to be for one, two or three years. Associate members are selected from the qualified resident voters of the Town.

Chapter 4.10-9 PARKS COMMISSION

4.109.1 _____ ~~Establishment, Appointment, and Composition~~Purpose.

The Town Council may appoint a Parks Commission is established, consisting of seven (7) members appointed as hereinbefore provided, who have demonstrated an interest in the Town parks and facilities, to provide ongoing citizen recommendations relating to the improvements or development of Town-owned property that is or is likely to be developed into Town parks to insure the preservation, beauty and protection of these most valuable sites.

B. The Commission may recommend to Council that associate members be appointed to assist the Commission, as the Commission may require. Associate members are nonvoting members except when a quorum is absent.

4.910.2 _____ Powers and Duties.

The Commission is to:

A. ~~Recommend to the Town Council an overall park management plan for the identification, protection, development or use of park lands and facilities;~~

B. ~~Meet with the Town Manager to review and advise, at least twice a year, on the status and progress of the park management plan and other pertinent issues;~~

C. ~~Coordinate its activities with those of the park, recreation, school and conservation bodies organized for similar purposes;~~

D. ~~Keep records of commission finances and activities, post agendas and minutes of meetings and make an annual report to the municipality;~~

E. ~~Assure that any recommended changes affecting municipal park properties are made in conjunction with the Conservation Commission;~~

F. ~~Formulate a commission budget to be presented to the Town Council for approval.~~

4.10.39.2.1 Powers.

The Commission may:

A. Make recommendations for use of the parks and park facilities to the Town Manager and/or the Planning Board;

B. Prepare and print books, maps and plans as it deems necessary;

C. With the approval of the majority of the Town Council, apply for grants or receive gifts in the municipality's Town's name for any of the Commission's purposes and to administer these grants or gifts for those stated purposes, as specified by the terms of the grant or gift consistent with all appropriate state statutes;

D. Make recommendations to the Town Council for revisions to the park fee policy and rate schedules.

4.9.2.2 Duties.

The Commission is to:

A. Recommend to Council an overall park management plan for the identification, protection, development or use of park lands and facilities;

B. Meet with the Town Manager to review and advise, at least twice a year, on the status and progress of the park management plan and other pertinent issues;

C. Coordinate its activities with those of the park, recreation, school, and conservation bodies organized for similar purposes;

E. Assure that any recommended changes affecting Town park properties are made in conjunction with the Conservation Commission;

F. Make budget recommendations to the Commissioner of Public Works related to parks.

4.10.4 Membership.

~~A. The Commission consists of seven members, qualified under Section 2.07(2) of the Town charter, who have demonstrated an interest in the Town parks and facilities. Members are initially appointed for terms of one, two and three years, such that the terms of approximately one third of the members will expire each year. Their successors will be appointed for terms of three years each. Members serve until their successors are appointed and qualified. Vacancies are filled by town council appointment for the unexpired term.~~

~~B. The Commission may recommend to the municipal officers that associate members be appointed to assist the commission, as the commission requires. Associate members are nonvoting members except when a quorum is absent. Their terms of office are to be for one, two or three years. Associate members are selected from the qualified resident voters of the Town.~~

4.104 KITTERY PORT AUTHORITY.

4.104.1 Establishment, Appointment and Composition.

~~The Port Authority is established by Maine Private and Special Law 1961, Chapter 163, as amended, and Town Charter, Article IX, consisting of seven (7) members appointed as hereinbefore provided and serve terms of five (5) years.~~

4.11.2 Appointment and Composition.

~~A. The Port Authority consists of seven (7) members, who are Kittery residents serving staggered terms of office of five years.~~

B. Six members of the Port Authority are appointed by the Town Council, and the Planning Board Chair appoints one representative to serve on the board.

C. No member shall serve more than two (2) consecutive terms of five (5) years. Any member who has served two (2) consecutive terms of five (5) years is ineligible to serve on the board for a period of 1 year. Computation of term limits does not include terms of fewer than five (5) years after their effective date.

~~C. A municipal officer, or spouse thereof, may not serve as a member of the Port Authority.~~

~~D. Members serve until their successors are appointed and qualified.~~

~~E. No member may serve more than 2 consecutive terms of 5 years. Any member who has served 2 consecutive terms of 5 years is ineligible to serve on the Board for a period of 1 year. Computation of term limits commences with the first term of 5 years following the effective date of this provision. Service for more than one-half of a term is considered a full term for the purpose of calculating term limits. Computation of term limits does not include service prior to the effective date of this provision nor to terms of fewer than 5five (5) years after the effective~~

654 date.

655 F. ~~Vacancies are filled by Town Council appointments for the unexpired term.~~ **4.10.2**

656 **Powers and Duties.**

657 The Board has such powers and performs such duties as provided by law and as delineated in
658 Town Code Title 16 §1.6.

NOTE: Following included for information only:

**KITTERY PORT AUTHORITY, PRIVATE AND SPECIAL 1961, Chapter 163
AN ACT Creating the Town of Kittery Port Authority**

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. Authority established. The Town of Kittery Port Authority is established, consisting of and governed by a Board of 7 members, 6 of whom are appointed by the Town Council of the Town of Kittery. At least 3 of the appointive members must be permanent residents of the Town of Kittery, and the members serve for a term of 5 years, providing that of the first appointment 2 are appointed for a term of one year, one for a term of 2 years, one for a term of 3 years, one for a term of 4 years and one for a term of 5 years. The members serve until their successors are appointed and qualified. Any vacancy occurring in the membership of the appointive members is filled by the Town Council for the unexpired term.

In addition to the 6 appointive members, a member of the Town Planning Board designated by the chair of the Town Planning Board is a member of the port authority, serving for a term of 5 years or until membership on the planning Board terminates, whichever occurs first. The Board shall elect one of its members as chair, one as a vice-chair and one as secretary. The members of the Board are not entitled to compensation for their services; but their reasonable expenses incurred in the performance of their duties must be paid by the Town of Kittery. The Board has the right to adopt and alter a common seal and to establish bylaws and regulations for the management of its affairs within the meaning of this authority, the laws of the State of Maine and the ordinances of the Town of Kittery.

Sec. 2. Purposes. The Town of Kittery Port Authority, in cooperation with the other appropriate planning and development Boards that may exist in the Town of Kittery, shall:

I. Plan for the maintenance and development of the port, harbor and navigable tidal waters within the jurisdiction of the Town of Kittery, in order to foster and stimulate commercial and recreational use of these areas.

II. Aid in the development of salt water fisheries and associates industries; ship and boat building, repair and storage and associated industries; pleasure boating, swimming and other associated recreational uses of these areas and facilities.

~~**III.** Be authorized and empowered to appoint and compensate a harbor master, who will enforce the directives of the authority, such as the placement of moorings, the assignments of anchorage areas and the movement of traffic, and the use of municipally owned wharves, docks, piers and landings. Cooperate with any agencies or departments of the federal, state and town in planning the maintenance, development and use of the areas herein defined.~~

Sec. 3. Powers and duties. In order to enable it to carry out the

purposes hereof, the authority shall:

I. Have the authority to make all necessary arrangements with other port authorities of the State of Maine, other states and federal departments and agencies for the interchange of business, and for such other purposes as will facilitate and increase the purposes of this authority.

II. Establish offices for the transaction of its business at such places as, in the opinion of the authority, shall be advisable and necessary in carrying out the purposes hereof.

III. Be authorized and empowered to appoint and compensate a harbor master, who will enforce the directives of the authority, such as the placement of moorings, the assignments of anchorage areas and the movement of traffic and the use of municipally-owned wharves, docks, piers, and landings.

IV. Be authorized to raise funds for defraying the costs of administration and operation of the authority and projects under its supervision, through fund appropriation articles in the Town warrant, submitted for consideration at any Town meeting, and through any and all other sources of revenue authorized by this act.

V. Be custodian of municipally-owned wharves, docks, piers and landings.

Sec. 4. Rules and regulations. Said authority may make such ordinances, rules and regulations touching municipally-owned wharves, docks, piers and landings, port captains, pilots and pilotage, harbors and harbor masters, for the areas herein defined as it may deem proper and from time to time may modify, rescind or alter the same. Said rules and regulations shall have the force and effect of law. Said authority shall fix the fees of pilotage and a table of such fees shall be attached to the commission of each pilot.

Sec. 5. Pilots. The authority may prescribe the qualifications of pilots, and from time to time appoint and commission, under its hand and seal, as many pilots as it may judge necessary, and remove the same at pleasure, and it shall take from them such security, by bond or otherwise as it may deem proper.

Sec. 6. Authority of pilot. Any pilot appointed by the authority who has given security for the faithful discharge of his duties may take charge of any vessel, except pleasure, coasting and fishing vessels of the United States registry of 150 registered or enrolled tons and under, and except as provided in section 7, and shall pilot such vessel into or out of the river and harbor of the Piscataqua, to ports or locations within the jurisdictional area of this authority, first showing to the master thereof his appointment, if requested.

Sec. 7 Fee an-on offer. Any master or owner may pilot his own vessel into the area herein defined, but if a pilot shall speak and offer service to a vessel, excepting registered or enrolled vessels of the United States, bound into said area south of a line drawn east and

west from Whale’s-back lighthouse, or shall offer service to a vessel bound out of said area excepting registered or enrolled vessels of the United States, before they leave the wharf, he shall be entitled to $\frac{1}{2}$ of the fee specified in his warrant in case the master declines to employ him, and, on refusal of payment, may sue for and recover same.

Sec. 8. Harbor master. The harbor master appointed by the authority shall have the authority, under the supervision of the authority, to oversee the jurisdictional area of this authority, to preserve and regulate navigation within said waters, to assign moorings, require the same to be kept in safe condition, to require the removal of vessels if necessity or an emergency arises, to inquire into and prosecute all offenses occurring within his jurisdiction and to perform such duties and enforce such regulations as the authority shall prescribe. The harbor master shall have authority to make arrests for offenses under the provisions of this chapter, as other peace officers are authorized to do.

Sec. 9. Penalty. Whoever violates any of the rules or regulations of the authority promulgated under the authority of this chapter, or refuses or neglects to obey the lawful and reasonable orders of a harbor master or resists him in to execution of his duties shall be punished by a fine of not more than \$50. All fines collected under this section shall be forwarded to the port authority and by it applied to the salary of the harbor master.

Sec. 10. Definition. The word “vessel” as used in this chapter shall include boats of all sizes propelled by said, machinery or hand, scows, dredges, shellfish cars and craft of every kind.

Sec. 11. Authorization to establish foreign-trade zones and free port areas.

I. Said authority is authorized to make application to the Secretary of Commerce of the United States for the purpose of establishing, operating and maintaining foreign-trade zones in the area herein described, under the Act of Congress passed at the second session, 73rd Congress, providing for the establishment, operation and maintenance of foreign-trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes.

II. Said authority shall have full power and authority to select and describe the location of the zone for which application to establish may be made and to make such rules and regulations concerning the operation, maintenance and policing of same as may be necessary to comply with the Act of Congress creating said foreign-trade zones, or as may be necessary to comply with such rules and regulations made in accordance with the Acts of Congress, relating to foreign-trade zones.

III. Said authority shall have full power and authority to lease the right and erect, maintain and operate any structures or buildings or enclosures as may be necessary or proper for the establishing and operating any such foreign-trade zones that might be established in

798 the area herein described under and by virtue of said act of the 2nd
799 session of the 73rd Congress.

800 IV. The authority hereby granted to said port authority confers on
801 said port authority the right and duty to do all things necessary and
802 proper to carry into effect the establishing, maintaining and
803 operating of foreign-trade zones within the area herein described to
804 comply in full with the provisions of said Act of Congress and all
805 regulations that might be made thereunder.

806 V. The Town of Kittery Port Authority shall have the power and the duty
807 to establish in the area herein described an area wherein personal
808 property in transit shall be exempt from the provisions of the stock-
809 in-trade tax and other such taxes and customs as are normally levied
810 in a port of entry. For the purpose of this section, personal
811 property in transit through the areas established by this port
812 authority is defined as follows: Goods, wares and merchandise which is
813 (1) moving in interstate or international commerce through or over the
814 areas hereinbefore established, or (2) which was consigned to a
815 warehouse, public or private, within the Town of Kittery, whether
816 specified when transportation begins or afterward. Such property shall
817 not be deprived of exemption because while in the warehouse the
818 property is assembled, bound, joined, processed, disassembled,
819 divided, ~~but~~cut, broken in bulk, relabeled or repackaged.

820 The exemption granted shall be liberally construed to effect the
821 purpose of this act. Provided, however, that the warehouse in which
822 said goods, wares or merchandise be stored shall not be owned, in
823 whole, or in part by the consignee or consignor.

824 **Sec. 12. Severability.** If any provision of this chapter shall be
825 held invalid, the remainder of the chapter shall not be affected
826 thereby.

827 Amended:

828 Private and Special 1963, Chapter 97, §2

829 Private and Special 1993, Chapter 26, §1